

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1313

U.S.A. v. Volpe, et al
Appellants' Joint Brief

B

P/S



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-1313
77-1317
77-1344
77-1347
77-1350
77-1355
77-1367
78-1033
78-1082
78-1083
78-1084
78-1085
78-1090

UNITED STATES OF AMERICA

Appellee

V.

ANTHONY D. VOLPE, MICHAEL T. O'BRIEN,
LAWRENCE DI BENEDETTO, JOHN T. DELLA
FERRA, CHARLES BOORNAZIAN, EUGENE POULIN,
WILLIAM JACOMINI, RICHARD BOVINO, ROBERT
E. MORRIS, FRANK CECCHINI, GEORGE SPEZIALE,
and JOHN LEPITO,

Appellants

UNITED STATES OF AMERICA,

Appellee

v.

ANTHONY D. VOLPE and
DENNIS BYRNE,

Appellants

UNITED STATES OF AMERICA

Appellee

V.

ANNE STEFANOU

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

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STATUTES INVOLVED

TITLE 18 U.S. Code

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section--

(1) "illegal gambling business" means a gambling business which--

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrest, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of \$2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary,

and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, §803(a), Oct. 15, 1970, 84 Stat. 937.

§ 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances

described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection. Added Pub.L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

§ 2 Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, 17b, 65 Stat. 717.

§ 1503. Influencing or injuring officer, juror or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

As amended Oct. 17, 1968, Pub.L. 90-578, Title III, §301(a) (1), (3), 82 Stat. 1115.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United

States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91-452, Title IV, §401(a), Oct. 15, 1970, 84 Stat. 932, and amended Pub.L. 94-550, § 6, Oct. 18, 1976, 90 Stat. 2535.

§ 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

.

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign

commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen--

Shall in each case be fined not more than \$5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

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CONNECTICUT GENERAL STATUTES

§ 53-278b. Gambling; professional gambling; penalties

(a) Any person who engages in gambling, or solicits or induces another to engage in gambling, or is present when another person or persons are engaged in gambling, shall be guilty of a class B misdemeanor; provided natural persons shall be exempt from prosecution and punishment under this subsection for any game, wager or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only and in which no person is participating, directly or indirectly, in professional gambling.

(b) Any person who engages in professional gambling shall be guilty of a class A misdemeanor.

(1973, P.A. 73-455, §2)

STATEMENT OF THE CASE

On April 7, 1976, a Grand Jury sitting at Hartford, Connecticut, returned several true bills of indictment charging various defendants with violations of various Federal criminal statutes.¹ Said indictments stemmed in large part from the Grand Jury's investigation of "organized crime" in the Hartford area, which investigation was principally based on conversations overheard by means of electronic surveillance.

In Criminal No. H-76-37, the Grand Jury returned an eight-count indictment charging twenty defendants with the following:

Count One: that the co-defendants Michael T. O'Brien and Anthony D. Volpe did engage in an enterprise affecting interstate commerce, to wit an illegal gambling and debt collection business utilizing facilities at 103 New Britain Avenue, Hartford, Connecticut, and in the conduct of said enterprise engaged in a pattern of racketeering activities and the collection of unlawful (usurious) debts; in violation of 18 U.S.C. §§1962(c), 1963 and 2.

Count Two: that the co-defendants O'Brien and Volpe and seventeen named but unindicted co-conspirators conspired to engage in the aforesaid enterprise through a pattern of racketeering activity and the collection of an unlawful debt, in violation of 18 U.S.C. §§1962(d)

¹All of those persons indicted in these several matters are not parties to this appeal. Several persons convicted are not appealing; others had their charges dismissed. Several others have appeals pending on their separate trial of Crim. No. H-76-37, and are awaiting completion of the trial transcript in that matter.

and 1963.

Count Three: that the co-defendants O'Brien, Volpe and John T. Della Ferra, Charles Boornazian, Eugene Poulin, John Castagna, Lawrence DiBenedetto, William Jacomini, Richard Bovino, Michael Chiarizio, Robert E. Morris, Frank Cecchini, George Speziale, Andrew Mascola, Ralph Irace, John Lepito, Joseph Guerriero and William Grant, Jr., conducted, managed, supervised and directed all or part of an illegal gambling business together, which bookmaking and numbers business was in substantially continuous operation for a period of in excess of thirty (30) days, and had a gross revenue of \$2,000 or more on one or more days and involved five or more persons, and which was in violation of the laws of the State of Connecticut, in violation of 18 U.S.C. §§1955 and 2.

Count Four: that the co-defendants named in Count Three conspired to conduct the aforesaid illegal gambling business in violation of 18 U.S.C. §371.

Count Five: that the co-defendants Volpe and Di Benedetto, and one Ronald Del Mastro conspired to use extortionate means to collect from one debtor George DeMirs an extension of credit in the approximate amount of \$1,200; and that Del Mastro, Volpe and DiBenedetto conspired to make explicit and implicit threats of violence to cause harm to said DeMirs, in violation of 18 U.S.C. §894.

Count Six: that defendant O'Brien used extortionate means to attempt to collect from debtor Robert Hames an extension of credit in the approximate amount of \$3,500; and that O'Brien expressly and

implicitly, by use of a telephone call, threatened the use of violence to cause harm to Hames, in violation of 18 U.S.C., §894.

Count Seven: that O'Brien, and co-defendants John Sullivan and Francis J. Campanelle conspired to use extortionate means to collect an extension of credit from Joseph C. Barresi, a debtor; and the conspired to use violence and to make explicit and implicit threats of the use of violence and other criminal means to cause harm to the person and property of said Joseph C. Barresi and others, in violation of 18 U.S.C. §894.

Count Eight: that defendant Volpe corruptly endeavored to influence one Betty Beaulieu not to testify before an investigating Federal Grand Jury sitting at Hartford, Connecticut, and thereby corruptly endeavored to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Connecticut, in violation of 18 U.S.C. §1503.

In Criminal No. H-76-41, the Grand Jury returned a one-count indictment charging the co-defendants and co-conspirators Anthony D. Volpe, Dennis Byrne and Francis Lisella, and the unindicted co-conspirators Ronald Del Mastro and James Smuckler, with conspiring to convert or steal (hijack) a truck moving as an interstate shipment with a load of meat in violation of 18 U.S.C. §371.

In Criminal No. H-76-39, the Grand Jury returned a three-count indictment charging the defendant Anne Stefanou, with the following:

Count One: that the defendant, while under oath before a Federal Grand Jury did make a false material declaration concerning her presence at and participation in transactions between Anthony Volpe and Betty Beaulieu involving stolen womens clothing, in violation of 18 U.S.C. 1623.

Count Two: that the defendant, while under oath before a Federal Grand Jury did make a false material declaration concerning whether or not she had seen and spoken to one Betty Beaulieu on certain occasions, in violation of 18 U.S.C. 1623.

Count Thre that the defendant, while under oath before the aforesaid Federal Grand Jury did make a false material declaration concerning whether or not she had participated in and had specific recollections of certain phone calls with Anthony Volpe, in violation of 18 U.S.C. §1623.

Numerous pre-trial motions were filed on behalf of these defendants and argued to the Court. A motion to suppress the fruits of the electronic surveillance was made and argued in all three matters. After a four-day hearing and the filing of briefs, the Court (Clarie, J.) denied said motion in a lengthy memorandum set out in the Joint Appendix hereto. Judge Clarie also denied defendants' motion to disqualify himself from hearing said motions to suppress.

After several pre-trial hearings, absent a specific motion by the Government, and over the opposition of counsel, the Court severed defendants Volpe, O'Brien and Di Benedetto from the other defendants in Crim.

No. H-76-37, and set the order of trial that these three defendants would proceed to trial first. (App., Vols.VII & VIII). Prior to trial, the Court severed Count Eight against Volpe and said Count was later dismissed on November 28, 1977.

On April 12, 1977, the trial of appellants Volpe, O'Brien and DiBenedetto commenced with the selection of a twelve-person jury, with four alternates. After a lengthy trial, the appellants moved for judgment of acquittal at the end of all the evidence. (Vol. XXIII p.). On May 27, 1977, the jury returned a verdict of guilty against appellant Volpe on Counts 1, 2, 3, 4 and 5; against appellant O'Brien on Counts 1, 2, 3, 4, 6 and 7; and against appellant DiBenedetto on Count 5. (Vol. XXIVpp.). The jury acquitted appellant DiBenedetto on both Counts 3 and 4. (Vol. XXIV pp. Subsequent motions to set aside these verdicts, to enter a judgment of acquittal and for a new trial were heard and denied by the Court for all three appellants. (Vol. XXV pp.).

On July 5, 1977, Judge Clarie imposed the following sentences:
appellant Volpe: Count One: not less than three or more than ten years imprisonment and a \$20,000 committed fine; Counts Two, Three and Four: three years imprisonment on each concurrent with the sentence imposed on Count One; Count Five: not less than three or more than ten years imprisonment and a \$20,000 committed fine, concurrent with sentences imposed on Counts One through Four;

appellant O'Brien: the same sentence on Counts One through Four as received by appellant Volpe; Count Six: not less than

three nor more than ten years imprisonment and a \$20,000 committed fine concurrent with sentenced imposed on the other counts; Count Seven: not less than three nor more than ten years imprisonment and a \$20,000 committed fine concurrent with sentences imposed on all other counts.

appellant DiBenedetto: on Count Five eighteen months imprisonment and a \$5,000 committed fine.

Appellants Volpe, O'Brien and DiBenedetto are at liberty on bond pending the outcome of this appeal.

OTHER PROCEEDING CONCERNING OTHER
APPELLANTS IN CRIM. NO. H-76-37

On June 27, 1977, after the trial of appellants Volpe, O'Brien and DiBenedetto, the Court scheduled the trial of the other defendants in this Indictment. On this date appellants Jacomini, Bovino, Morris, Cecchini, Speziale, Lepito, Della Ferra, Poulin and Boornazian, each entered a plea of "Guilty" to Count Three of the Indictment.

On July 28, 1977, Judge Clarie imposed the following sentences on those aforesaid who plead "Guilty" on Count Three: Della Ferra, eighteen months imprisonment, a \$3,000 committed fine, execution suspended after serving six months, two years probation, and a dismissal of Count Four; Boornazian, eighteen months imprisonment, a \$2,500 committed fine, execution suspended after serving four months, two years probation, and dismissal of Count

Four; Bovino, eighteen months imprisonment, a \$2,500 committed fine, execution suspended after serving ninety days, two years probation, and dismissal of Count Four; Cecchini, eighteen months imprisonment, a \$3,000 committed fine, execution suspended after ninety days, two years probation, and dismissal of Count Four; Speziale, eighteen months imprisonment, a \$1,000 committed fine, execution suspended after serving ninety days, two years probation, and dismissal of Count Four; and Lepito, eighteen months imprisonment, a \$2,500 committed fine, execution suspended after thirty days, two years probation, and a dismissal of Count Four.

On July 29, 1977, Judge Clarie imposed the following sentences on those other aforesaid defendants who entered "Guilty" pleas on Count Three: Poulin, eighteen months imprisonment, a \$500 committed fine, execution suspended, two years probation, and a dismissal of Count Four; Jacomini, eighteen months imprisonment, a \$2,500 committed fine, execution suspended after serving four months, two years probation, and a dismissal of Count Four; and Morris, eighteen months imprisonment, a \$1,000 committed fine, execution suspended, two years probation and a dismissal of Count Four.

Appellants Della Ferra, Boornazian, Bovino, Cecchini, Speziale, Lepito, Poulin, Jacomini and Morris are all at liberty on bond pending this appeal. Each pursuant to an agreement with the Government and the Court has expressly reserved his right to appeal Judge Clari's denial of appellants' motion to suppress the fruits of the electronic surveillance. Said reservation of right was mutually agreed upon prior to the entering of pleas of "Guilty" by these appellants on Count Three.

OTHER PROCEEDINGS CONCERNING VOLPE
AND BYRNE, APPELLANTS IN CRIM. NO. H-76-41

On October 12, 1977, both appellants Volpe and Byrne entered please of "Nolo Contendere" to this one-count indictment. Each at that time expressly reserved the right to appeal Judge Clarie's denial of appellants' motion to suppress the fruits of the electronic surveillance. The Court accepted the pleas and reservation of right to appeal and entered findings of "Guilty" for both appellants.

On November 28, 1977, Judge Clarie imposed identical sentences on appellants Volpe and Byrne of one year imprisonment, execution suspended, one year probation. Both appellants are at liberty on bond pending this appeal and both exercised their option to commence their probationary supervision on November 28, 1977, despite the pendency of this appeal.

PROCEEDINGS CONCERNING APPELLANT
STEFANOU, AND CRIM. NO. H-76-37

On December 13, 1977, appellant Stefanou entered pleas of "Nolo Contendere" to all three counts of this indictment. Appellant expressly reserved her right to appeal Judge Clarie's denial of appellant's motion to suppress the fruits of the electronic surveillance. The Court accepted these pleas and the reservation of right to appeal and entered findings of "Guilty" on all three counts.

On February 14, 1978, Judge Clarie imposed the following sentence on appellant Stefanou: two years imprisonment on each

count, suspended after thirty days, a \$500 committed fine and two years probation, with this sentence on Counts Two and Three to run concurrently with the identical sentence imposed on Count One. The appellant is free on her own recognizance pending this appeal.

All the aforesaid appellants filed timely Notices of Appeal to this Court. On March 2, 1978, this Court ordered all their appeals consolidated for the purposes of briefing and argument. Lead Counsel and associate lead counsel were also designated by order of this Court, and the Government and appellants were given until April 27, 1978, to file a Joint Appendix in this matter, ten days subsequent to the submission of appellants' consolidated brief.

QUESTIONS PRESENTED

- I. Did the District Court Err in Denying Appellants' Pre-trial Motions To Suppress The Fruits of The Electronic Surveillance?
 - A. Should The Motion To Suppress Have Been Granted On The Ground That The Government Failed to Disclose To The Court A 1972 State Wiretap Involving 103 New Britain Avenue and Michael T. O'Brien?
 - B. Should The Motion To Suppress Have Been Granted On The Ground That The Government's Affidavit Failed To Establish That Other Investigative Procedures Had Been Tried and Failed or Would Reasonably Appear To Be Unlikely To Succeed If Tried or Would Be Too Dangerous?
 - C. Should The Motion To Suppress Have Been Granted On The Ground That A Joint Application By The Government For The Simultaneous Interception of Both Wire and Oral Communications Is Neither Authorized Nor Contemplated By The Statute?
 - D. Should the Motion to Suppress Have Been Granted Due To The Conduct of the Government In Failing to Follow The Court's Instructions An In Engaging In A Series of Unauthorized Surreptitious Entries?
 - (1) Did The Failure By The Government To Advise The Court That The Wiretap Could Be Connected

To A Pole Behind 96 New Britain Avenue Violate
The Court's Instructions at the December 19, 1974,
In Chambers Hearing?

- (2) Does Title III, Either Expressly or Impliedly,
Authorize A Court To Order Surreptitious Entries?
- (3) Did The Failure of The Court Order To Authorize
Surreptitious Entries And To Control The Discre-
tion of The Agents Result In The Illegal
Installation of the Wiretap and Microphone?
- (4) Should The F.B.I. Have Engaged in a Surreptitious
Entry At 103 New Britain Avenue Without First
Obtaining Specific Authorization From The Attorney
General or His Speciall Designated Assistant?
- (5) Can Surreptitious Entries Be Made Onto Premises
of A Landlord or Custodian Without Notice
To Them or Without A Showing To The Court That
Such Notice Would Jeopardize The Investigation?

E. Should The January, 1975, Interceptions Have Been
Suppressed As The "Fruit" of the December Order?

F. Did The District Court Err In Ruling that the
Appellants Did Not Have The Requisite Standing
To Demand The Suppression of the Evidence?

II. Did The District Court Err In Failing To Disqualify Itself
From Hearing and Ruling Upon The Motion To Suppress?

III. Did The District Court Err In Denying Appellants Volpe and DiBenedetto A Severance, And In Trying Appellants Volpe and DiBenedetto Prior To The Other "Gambling" Defendants?

- A. Did The District Court Err in It's Denial of a Severance and a Different Order of Trials Which Denied the Appellants Volpe and DiBenedetto The Opportunity To Present Exculpatory Evidence And A Full Defense?
- B. Did The District Court Err in Denying Appellant DiBenedetto's Pre-Trial and Trial Motions For A Severance When DiBenedetto Suffered A Wrongful Joinder Under Rule 8(b), Federal Rules of Criminal Procedure?
- C. Did The District Court Err in Denying Appellant DiBenedetto's Pre-Trial and Trial Motions For Severance When DiBenedetto Was Prejudicially Joined In Violation of Rule 14, Federal Rules of Criminal Procedure?

IV. Did The District Court Err in Refusing To Give The Charge Requested By Appellants From United States v. Curcio Concerning The Definition of "Implicit Threats" In An Extortion Charge?

STATEMENT OF FACTS

Appellants are not challenging the sufficiency of the evidence on appeal. Since this is so, and due to the length of this Consolidated Brief, and because the pertinent facts are discussed at some length with each point of argument, the appellants will not state a chronological narrative version of the facts herein.

The factual background of the hearings on the motion to suppress the fruits of the electronic surveillance, and pertaining to the order of and the installation of the wiretap and bug, is discussed thoroughly in POINT I.

The factual background necessary to an understanding of Points III and IV is also discussed therein.

POINT I

THE DISTRICT COURT ERRED IN DENYING
APPELLANTS' PRE-TRIAL MOTIONS TO SUPPRESS
THE FRUITS OF THE ELECTRONIC SURVEILLANCE

BACKGROUND FACTS ON MOTION TO SUPPRESS

On December 16, 1974, the Hon. T. Emmet Clarie signed an order authorizing the interception of wire and oral communications of Michael O'Brien and others at premises known as 103 New Britain Avenue, Hartford. The order was the result of an affidavit signed by Special Agent Dewey L. Santacroce of the F.B.I. and an application filed by Paul E. Coffey and Peter Casey, Strike Force Attorneys. Authorization to file the application was provided by William B. Saxbe, Attorney General of the United States by way of a memorandum dated December 12, 1974. Neither the authorization, application, affidavit nor order made reference to an entry into premises known as 11 Julius Street or 99 New Britain Avenue.

The Premises

The premises known as 103 New Britain Avenue is the location of the O'Brien-Sullivan Home Improvement Co., which is owned and operated by Michael O'Brien, the central target of the December 16th interception order. This company is one of a number of commercial and residential tenants housed in an L-shaped building known as 11 Julius Street. (Vol. III, p. 33). A portion of the basement area consists of a number of partitioned rooms. As one descends the stairs to the basement, a coin-operated washer and dryer are located immediately to the left (Vol. III, p. 37). Also to the left is small office (Vol. III, p. 37-8). Beyond the furnace is a large, timber wire mesh enclosure which is situated underneath 99 New Britain Avenue (Vol. III, p. 38). Underneath 103 New Britain Avenue is another wire mesh enclosure, access to which is gained through a wire mesh door. (Vol. IV, pp. 243-4). Located in the basement are two telephone terminal boxes. (Vol. IV, pp. 245-6). One terminal box is located on a support column before one reaches the basement and is marked "telephone box and pole of Government's Exhibit 3 of the hearing on the Motion to Suppress. (App. ; Vol. III, p. 38; Vol.). Another box is located in a timber, wire mesh enclosure beneath 99 New Britain Avenue. (Vol. IV , p. 246).

The Initial Visits to the Premises

During the early morning hours of December 17, 1974, Special Agents H. Edward Tickle, a security technician from Washington, Richard D. Ludwig, Dewey Santacroce, James Miller and Phillip Krum

arrived at 103 New Britain Avenue. (Vol. IV, pp. 292, 294, 299). Agent Tickle then made a key for 103 New Britain Avenue and entered the premises along with Agent Ludwig. (Vol. IV, pp. 297-299). Agent Tickle then attempted to impression the lock to the rear door entrance to the common basement area but was unable to do so because the lock was malfunctioning. (Vol. IV, p. 301).

Agent Tickle then proceeded to 11 Julius Street, proceeded through the two outer swinging doors and entered into the front hallway area. (Vol. IV, p. 302). He did not attempt to make a key impression to the door leading to the common basement because a skeleton key was needed. At that time the agents ceased their activities for the night. (Vol. IV, p. 303).

During the early morning hours of December 18, 1974, Agents Tickle and Ludwig returned to the premises. (Vol. IV, pp. 246-7, and 306). They were accompanied on this occasion by Special Agent Robert Puckett, a sound technician, and Special Agent McWhorter. (Vol. IV , pp. 237-241). Agent Puckett entered 102 New Britain Avenue with the key made by Agent Tickle on December 17, 1974. Puckett then placed a microphone or bug under the floor of 103 New Britain Avenue where a water pipe ran through a hole in the floor to the basement. (Vol. IV, p. 240). The wires attached to the bug were dropped through the hole and dangled below in the basement. (Vol. IV, p. 240-1). While Agent Puckett was performing his duties, Agent Tickle and another agent entered the basement area of 11 Julius Street through the use of a skeleton key to the front basement door, which key had been flown in from Washington.

(Vol. IV, p. 307). Agent Tickle then entered the wire mesh cage below 103 New Britain Avenue by picking the lock to the cage door. (Vol. IV, p. 308-9). Agent Tickle then took hold of the wires from the bug and connected them to the telephone box on the post. (Vol. IV., p. 309). Upon leaving the wire mesh cage he locked the door. (Vol. IV, p. 309, 332-3). Agent Puckett had in the meantime come down to the basement and assisted in the hookup of bug. (Vol. IV, p. 245). Hereafter Puckett attempted to connect the wires he knew to be at a multiple of telephone number 247-6309 to a circuit wire he had leased from the telephone company. He also tried to connect the but to another pair of leased wires. (Vol. IV, p. 245). No attempt was made to connect the wiretap or bug to the telephone box inside the cages area below 99 New Britain Avenue. (Vol. IV, p. 246). The attempt to make the foregoing connections were unsuccessful. (Vol. IV, p. 247). While Agent Puckett was engaged in these activities, Agent Tickle went to the rear cellar entrance and made a key to the lock on that door. (Vol. IV, p. 310). Agent Tickle did not file a report of his key-making mission. (Vol. IV, p. 313).

During the evening hours of December 18, 1974, Agent Puckett returned to the premises (Vol. IV, p. 248). Agents Ludwig and Santacroce accompanied him, but Agent Tickle did not. (Vol. IV, p. 248). Again entry was made into the basement via a key to the front door of 11 Julius Street (Vol. IV, p. 249). Puckett and Ludwig again attempted to get the interception equipment to function

but failed. (Vo. IV, p. 249). In checking the wires, Puckett entered the wire mesh cage below 103 New Britain Avenue. The door to the cage was unlocked and Puckett pulled it open. (Vol. IV, p. 253). Puckett thereafter reported his technical problems to Agent Santacroce (Vol. IV, p. 254).

The December 19th In Chambers Hearing

On December 19, 1974 from 10:10 a.m. to 10:30 a.m., an in chambers hearing was held concerning the wiretap and bug applications. Present were Judge Clarie, Attorneys Casey and Coffey and Agent Santacroce. Agent Santacroce reported to the Court that the appearances for telephone number 247-6309 were located in a corner of the basement housing 99 New Britain Avenue. (Vol. I, 12-19-74, p. 4). Agent Santacroce further testified that the box under 99 New Britain Avenue was "the sole place that the appearances are available, that would allow us access to utilize those appearances." (Vol. I, 12-19-74, p. 4). Agent Santacroce advised the Court that there was an alternative procedure that could be utilized by running two separate lease lines. (Vol. I, 12-19-75, p. 5). However, Mr. O'Connor of the Southern New England Telephone Co. preferred hooking up to the 99 New Britain Avenue box because it "would be a lot easier than for them to have to do what they would have to do to implement this, time-wise, particularly..." (Vol. I, 12-19-74, pp. 5-6, App. p.).

The Court then asked: "Now, would the additional authority require - what you already have, which is 103 New Britain Avenue, for this wiretap information - it would also require access to 101

New Britain Avenue and 99 New Britain Avenue, is that correct?" (Vol. I, 12-19-74, p. 6). Agent Santacroce responded: "It would only require us to go into 99 New Britain Avenue." (Vol. I, 12-19-74, p. 6).

Agent Santacroce advised the Court that entry into 99 New Britain Avenue would not interfere with business activity because: "We would not go in there during the period of business activity." (Vol. I, 12-19-74, p. 8).

Attorney Casey then advised the Court that he had a proposed order he would like to submit. Agent Santacroce further advised the Court that "it is also necessary for us to to into 11 Julia [sic] Street, which is this whole entire common basement, in order to hook on the box there, where our microphone wires would come into. So it would be going into both 99 New Britain Avenue and 11 Julia [sic] Street, to get to that box." (Vol. I, 12-19-74, pp. 8 and 9, App. p.).

At this point the Court expressed concern over the procedure: "He hasn't been served with papers; he doesn't know they are there, and they are trespassers and suppose he injured, grossly injured one of these strangers on his premises?..." (Vol. I, 12-19-74, p. 9, App. p.).

Mr. Coffey then advised the Court that "there is apparently no way that the Court's order can be implemented, unless the Court authorizes these agents to go on the premises..." (Vol. I, 12-19-74, p. 10, App. p.).

Again the Court expressed concern that the proprietor of John's Delicatessen might mistake the agents for burglars and shoot them. The Court then asked: "How expensive would it be to put in these lease wires to the pole?" Agent Santacroce responded that he didn't know but it would involve a time delay. The Court responded: "I think it would be wisdom to do that... I think wisdom would dictate that whatever it cost for the leased wire, for the telephone company to put it on a pole there, or down the street a block, that the money is well invested." (Vol. I. 12-19-74, pp. 10-12, App. p.).

Agent Santacroce then inquired what should be done if the phone company determined that the wiretap could be connected to another location but the microphone bug could not. The Court advised that when the information is obtained from the phone company, the hearing be reopened and the information be put on the record. (Vol. I, 12-19-74, p. 13, App. p.). This was never done. The proposed order the Court was asked to sign cannot be found.

Entry Into 99 New Britain Avenue

At 2:00 p.m. on December 19, 1974, approximately 3 1/2 hours after the in chambers hearing, Agent Puckett and a telephone repairman entered 99 New Britain Avenue. (Vol. IV, p. 255). They met the owner of the Delicatessen. (Vol. IV, p. 256). The repairman told the owner of the Delicatessen he wanted to to to the telephone equipment in the basement. (Vol. IV, p. 257). Agent Puckett did

not identify himself. (Vol. IV, p. 256). The repairman and Agent Puckett then went down the stairs at the rear of the Delicatessen into the wire meshed area. (Vol. IV, p. 259). John, the owner, unlocked the door leading into the caged area and they went in. (Vol. IV, p. 259). Thereafter the telephone and microphone wires were connected to the box inside the wire meshed cage below 99 New Britain Avenue (Vol. IV, p. 260).

Subsequent Visits

During the evening of December 19th, Agent Puckett returned to the basement area with Agent Ludwig. (Vol. IV, p. 261). The purpose of this visit was to make final connections for the wire and oral interception devices. (Vol. IV, p. 261). Entry was made into the basement via 11 Julius Street. (Vol. IV, p. 262). The two outer swinging doors may have been locked, and if they were entry was made with a key. (Vol. IV, p. 262-263). In any event, the basement door was locked and entry was made by use of a key. (Vol. IV, p. 262).

During the evening of December 20, 1974, Agents Puckett and Ludwig returned to the premises (Vol. IV., p. 264-265) for the purpose of determining why the microphone or bug was not working. (Vol. IV, p. 265). Again a key was used to gain entrance into the door leading to the basement at 11 Julius Street. (Vol. IV, p. 265). Again Agent Puckett entered the screened area below 103 New Britain Avenue; the door was not locked so he opened it to get in. (Vol. IV, p. 265-266).

On December 30, 1974, Agents Puckett and Ludwig again entered 11 Julius Street by use of a key to the basement door (Vol. IV, p. 266) and disconnected the tap and bug. (Vol. IV, p. 267). Interceptions at the premises ceased as of 2:57 p.m. on December 30, 1974. (Vol. I, 1-2-75, p. 3).

The January Tap

On January 10, 1975, the Government received authorization from Wallace H. Johnson, Assistant Attorney General for Land and Natural Resources Division for permission to apply for an extension of the wire and oral interception order of December 16, 1974 at 103 New Britain Avenue. On the same date, an in chambers hearing was held. Present were Judge Clarie, Peter Casey, Paul Coffey and Dewey L. Santacroce. Pursuant to the authorization, request was made for an extension of the December 16, 1974 Court order. At the conclusion of the hearing on the extension application, the Court expressed concern that the proposed order did not include a provision authorizing entry into 11 Julius Street. (Vol. I, 1-10-75, p. 26-32). Mr. Coffey and Mr. Casey attempted to allay the Court's concern (Vol. I, 1-10-75), but the Court insisted that "... the application should include the premises at 11 Julia [sic] Street." (Vol. I, 1-10-75, p. 35). The Court then reserved judgment on the application. (Vol. I, 1-10-75, p. 35).

Thereafter, a letter was forwarded to Mr. Casey by Wallace H. Johnson. The letter is file stamped January 15, 1975 and provides as follows:

Dear Mr. Casey:

On January 10, 1975, pursuant to 18 U.S.C. 2516, I authorized an application for an order authorizing the interception of oral and wire communications from a premises and a telephone located at 103 New Britain Avenue, Hartford, Connecticut. I have since been informed that question has arisen as to the authority of investigative and law enforcement agents to enter upon the premises for the purpose of installing an electronic device for the interception of oral communications and making necessary wire connections for the interception of wire communications authorized pursuant to the subsequent court order issued under 18 U.S.C. 2518. In my view, and that of the Department of Justice, an order authorizing the interception of oral or wire communications carries by implication the authority to make entry for the purpose of installing, maintaining, and removing the necessary electronic devices. In this connection, I note that Congress recognized the need for clearly investing the courts with even more extensive authority to facilitate the implementation of orders authorizing the interception of wire and oral communications. To this end, Congress provided, in part, in 18 U.S.C. 2518(4)(e), as follows:

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith with all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted.

I understand that the foregoing views are not entirely dispositive of your question, because the only access to the basement location in which necessary wire connections and the installation of the electronic interception devices have to be accomplished must be made through an entrance which, although located in the same building, bears an address different from that of the premises in which the communications which are to be intercepted are uttered. More specifically, it will be necessary to enter a hallway bearing the address of 11 Julia Street, Hartford, Connecticut, in order to install an electronic device in and to make connections to wires leading to the premises bearing the address of 103 New Britain Avenue, Hartford, Connecticut, both of which are part of the same building. At the time I authorized you to make application to a court of competent jurisdiction for an order authorizing

the interception of oral or wire communications from the premises located at 103 New Britain Avenue, Hartford, Connecticut, and the telephone located therein, I intended to encompass within my authorization all action reasonably necessary to implement the interception, including any necessary entry for the installation of interception of devices or the making of connections to wires leading to the premises from which the communications were to be intercepted. If my original authorization is not construed to encompass your situation, you may consider this letter as constituting my express authorization to apply to the court for such authority.

On January 16, 1975, the Court signed the extension order, which unlike the December, 1974 order, contained a provision authorizing agents to enter 11 Julius Street. (Vol. II, 1-16-75, pp. 4-5).

On January 16, 1975, at 8:45 p.m. Agents Puckett and Ludwig entered 11 Kulus Street with the use of the key to the front basement door. (Vol. IV, p. 269-70) The microphone and telephone tap were reconnected. (Vol. IV, p. 270).

Entrance was made in the same manner on January 29, 1975, and the microphone was removed and the tap disconnected. The agents again entered the wire mesh area below 103 New Britain Avenue. (Vol. IV, p. 271).

The Connecting to Pole 2602

In his order of December 16, 1974, Judge Clarie ordered the telephone company (hereinafter referred to as "SNETCO") to furnish the Government "all information, facilities and technical assistance necessary to accomplish the interception" of telephone facility 247-6309. The order did not order SNETCO to assist in

the installation of the bug. Between December 16 and 18, 1974, John O'Connor, security representative of SNETCO advised Special Agent Puckett that the wire interception connection could be made at a telephone box located in the basement of 101 New Britain Avenue or at telephone box 2602 located in the rear of 96 New Britain Avenue. (Mot. to Supp., Defendant's Exhibit 6; Vol. V, p. 538-546; App.). The telephone box in the rear of 96 New Britain Avenue had no spares or vacancies available on December 16, 1974 so that it could not be used immediately to connect the wiretap. (Vol. V, p. 558-559). However, it would have been a relatively simple procedure to create spares or vacancies. (Vol. V, p. 587). This procedure would not have created an interruption of service or caused any subscribers to change their telephone numbers. (Vol. V, p. 587). This in fact was a common procedure and could have been easily accomplished by SNETCO personnel. (Vol. V, pp. 588 & 613).

The wiretap was not connected to box 2602 because on December 18, 1974, Special Agent Puckett told Mr. O'Connor that it was not feasible to use that pole. (Vol. V, p. 611, 613-4). Agent Puckett was of the view that the pole could not be used because in addition to the wiretap he had to also connect a bug. And in order to connect the bug to the pole, a wire would have to be run from the basement of 103 New Britain Avenue across the street to pole 2602. (Vol. VI, p. 822-825).

POINT I.

- A. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED ON THE GROUND THAT THE GOVERNMENT FAILED TO DISCLOSE TO THE COURT THAT A 1972 STATE WIRETAP INVOLVING 103 NEW BRITAIN AVENUE AND MICHAEL T. O'BRIEN

At least three law enforcement officials were responsible for gathering the information which went into the affidavit in support of the wiretap and oral communication application of December 16, 1974 and January 16, 1975. Agent Dewey Santacroce was the agent in charge of the investigation (Vol. VI, p. 805-7) as did Captain Bernard Sullivan of the Hartford Police Department. (Vol. IV, p. 429). At page four of his affidavit, Agent Santacroce acknowledges that "this investigation has been a cooperative effort between Special Agents of the Federal Bureau of Investigation and police officers assigned to the Intelligence Division and the Special Service Squad of the Hartford, Connecticut Police Department."

During September, 1972, a panel of the Superior Court for Hartford County issued a wiretap order for the same premises ordered wiretapped and bugged in this case, 103 New Britain Avenue. (Mot. to Supp., Defs' Ex. 8, App.). As in the instant case, the central target of the state wiretap order was Michael T. O'Brien, a reputed bookmaker who used 103 New Britain Avenue as a front for his allegedly illegal enterprise. The State tap led to the arrest of many of the same persons who found themselves the defendants in these cases. (Mot. to Supp. Govern. Exhibit 5, App.).

Captain Sullivan worked with Agent Santacroce in the case at bar, assisted in the 1972 State arrests (Vol. IV, p. 428), and supplied information to the State Police which lead to the 1972 State wiretap order. (Vol. IV, p. 425-7).

Although Captain Sullivan testified that he never told the F.B.I. Agents about the State tap (Vol. V, p. 682), Agent Santacroce's affidavit reveals that Sullivan did tell him of a search he conducted of 103 New Britain Avenue on October 3, 1972. (p. 33). This search was conducted at the time of the wiretap arrest. (Mot. to Supp., Govern. Exhibit 5, App.). Shortly after the arrest, The Hartford Courant published a story concerning the arrests. The article prominently mentioned the fact that wiretaps were utilized in the investigation. Upon reading the article, F.B.I. Agent Ludwig clipped it and forwarded same to the Bureau's filing clerk in New Haven. (Vol. VI, p. 799).

On September 10, 1973, Agents Santacroce and Ludwig interviewed the target of the State wiretap, Michael O'Brien, in connection with an investigation into the placement of a microphone on the residential telephone of O'Brien's girlfriend, Katherine Malley. (Vol. VI, p. 770-2). In the course of the interview O'Brien told the agents that in 1972 he had been the subject of a State Police wiretap. (Vol. VI, p. 771). The agents reduced O'Brien's oral comments to written form (Mot. to Supp., Defendants' Exhibit 9, App.), and filed it in a Bureau file on O'Brien. (Vol. VI, p. 775). Prior to the wiretap application in this case, Agent

Santacroce reviewed all of his O'Brien file and simply failed to read the report of his interview with O'Brien. (Vol. VI, p. 776).

Agent Ludwig testified that based on the newspaper article in The Hartford Courant and the O'Brien interview, he knew of the 1972 State tap and would have included it in the affidavit had he drafted it. (Vol. VI, p. 811).

Thus the evidence is uncontroverted that the three law enforcement officers who helped to draft the affidavit knew at some time prior to December 16, 1974 that Michael T. O'Brien was the subject of a State wiretap order and that 103 New Britain Avenue had been the premises tapped.

Compliance with Section 2518 (1)(E) is a
"Stringent Pre-Condition" to the Issuance
of an Interception Order

Section 2518 of Title 18 details the procedures to be followed for the interception of wire and oral communications. The application for a wiretap order must:

A. Identify the officer making the application and the officer authorizing the application. Sec. 2518(1)(a)

B. Provide a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued including inter alia "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Sec. 2518(1)(B)

C. Provide a full and complete statement as to whether or not other investigative procedures have been tried and failed or are unlikely to succeed. Sec. 2518(1)(c)

D. Provide a statement of the priod of time for which the interception is required to be maintained. Sec. 2518(1)(d)

E. Provide "a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application." Sec. 2518(1)(d)

F. Where the application is for the extension of an order, provide a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results. Sec. 2518(1)(f)

The Supreme Court has made it very clear that failure to follow the foregoing six procedures will result in suppression. In United States v. Giordano, 416 U.S. 505, 527 (1974), the Court held that strict compliance with the provisions of Title III is required:

[W]e think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

In United States v. Chavez, 416 U.S. 562; 580 (1974), the Court again demanded strict compliance with statutory procedures:

Though we deem this result to be the correct one under the suppression provisions of Title III, we also deem it appropriate to suggest that strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought.

A post Giordano-Chavez decision, United States v. Bernstein, 509 F.2d 996 (4 Cir. 1975) acknowledges the need for strict compliance with statutory preconditions for obtaining an interception order:

Not every violation of Title III results in an unlawful interception. A violation is material only if Congress intended the statutory provision that was not followed to be "a precondition to obtaining... intercept authority." United States v. Giordano, 416 U.S. 505 (1974). Statutory preconditions, teaches the Court, "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 U.S. at 527, 94 S.Ct. at 1826. In contrast, violation of a statutory provision that does not "affect the fulfillment of any of the reviewing or approval functions required by Congress, "does not render an interception unlawful within the meaning of Sec. 2518(10)(a)(i). United States v. Chavez, 416 U.S. 562, 575, 94 S.Ct. 1849, 1956, 40 L.Ed.2d 380 (1974). Whether a statutory provision is a precondition to a valid order depends, then, on its role in the Act's system of restraints on electronic surveillance.

Recognizing the Court's admonition in Giordano, the Court of Appeals for the District of Columbia Circuit suppressed the fruits of a wiretap order in a case involving the same issue raised herein. United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974).

In Bellosi the Government appealed from an order suppressing wiretap interceptions as the result of the Government's failure to disclose to the issuing judge a prior application for one of the targets of the investigation. The District Court found, and the Government conceded on appeal, that the failure to disclose the prior application was intentional.

Affirming the suppression order, the Bellosi panel noted that Title III sets forth "stringent conditions" as a precondition for the issuance of wire interception orders. One of those conditions was considered by the Supreme Court in United States v. Giordano, supra. The High Court, noted the panel, refused to accept "the Government's attempt to stretch" the statutory language of Section 2518(1)(e), wrote the panel, is no less important than the provision considered in Giordano. The disclosure of prior applications is another "stringent condition" which must be satisfied before an interception order may be issued. The Bellosi panel went on to detail the important reasons for full disclosure of prior applications:

A judge balancing constitutionally protected privacy interests of particular citizens would want to know whether the Government had previously attempted to invade those interests. He might be more hesitant to authorize further interception of an individual who had been subjected frequently in the past to electronic surveillance. He might also desire to learn how protective other judges had been of the privacy interests which would have to be invaded by an interception of the communications of the individuals who are the targets of the application before him. Another judge's decision to deny or grant an application to invade these interests could be informative even if made in the context of a separate investigation. The prior judge's decision might even suggest ways by which an interception could be conditionally approved, such as limiting

its operation to certain hours in order to serve crime control needs with minimal encroachment on rights of privacy. In addition, the judge might desire to use the supplemental inquiry power vested in him by Section 2518(2) to determine the results of previously authorized interceptions involving the same persons, facilities, or places. If these interceptions had intruded substantially on the privacy of innocent individuals without providing law enforcement authorities with any significant evidence, the judge might scrutinize more carefully an application for further interceptions even if submitted in a separate investigation. Finally, and perhaps most pertinent to this case, a judge might choose to refuse authorization of a wire interception when an applicant relies on "facts and circumstances" derived from a previous illegal wiretap to justify his belief that the interception is warranted by law enforcement needs. A judge fully informed of previous applications involving the same persons, facilities, or places could inquire under Section 2518(2) into whether any of these applications resulted in interceptions which were not fully legal and, if so, whether any evidence obtained from the previous interceptions provided the basis for the authorization request presented to him. Id. at 538-539. Also see United States v. Turner, 528 F.2d 143, 153, (9 Cir. 1975).

The Bellosi panel also rejected the Government's contention that only the target of the undisclosed application had standing to move for suppression of the evidence derived from the wiretap. The panel observed that 18 U.S.C. Sec. 2510(11) defines "aggrieved person" as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." Id. at 842.

The Bellosi decision was cited with approval by a number of other courts. United States v. Donovan, 513 F.2d 337, 340 (6 Cir.

1975); United States v. Picone, et al, 408 F. Supp. 255, 262 (D. Kansas 1975); United States v. Baynes, 400 F. Supp. 285, 297, (E. D. Penn. 1975).

Negligent or Reckless Nondisclosure
of Prior Applications Requires Suppression

The Government argued on the motion to suppress and the Court found this situation distinguishable from Bellosi in that non-disclosure of the prior application was intentional while here it was negligent or reckless. The facts are clear that the three principal law enforcement officers in our case, Captain Sullivan, Agents Ludwig and Santacroce knew of the 1972 State wiretap. Agent Santacroce, who drafted the affidavit, was told of the prior tap by O'Brien on September 10, 1973. Agent Santacroce placed a copy of his interview with O'Brien in one of his files, reviewed the file prior to drafting the affidavit, but simply failed to read the interview with O'Brien which revealed the 1972 State wiretap:

Q. And did you, when you applied to Judge Clarie, check all of your Michael O'Brien files to determine whether or not there had been any previous wiretaps of this individual?

A. Yes, I did.

Q. All of your files?

A. Yes.

Q. So would it be fair to say that what happened is that you simply didn't read this Defendant's 9, or it didn't click or something?

A. I believe that when I reviewed the file, which included this -

Q. Defendant's 9?

A. Defendant's 9, correct -- that I went through it very quickly and I just missed that.

Q. All right. Now, did you ask any other agent to review the O'Brien file to assist you in determining whether or not there had been prior taps on O'Brien?

A. No, I didn't. I didn't.

(Vol. VI, p. 776)

Of course Agent Ludwig also knew of the 1972 State wiretap and would have included this information in the affidavit he had drafted it. (Vol. VI, p. 811).

The failure to include the 1972 State tap information in the affidavits and applications borders on reckless nondisclosure. What the court said in United States v. Swanson, (D. Nevada 1975) has equal applicability here:

...If a government agent or several government agents working together produce an affidavit to support an arrest or search warrant or an application for an order authorizing electronic surveillance, which recklessly or intentionally made a misrepresentation of the material facts supporting probable cause, the evidence obtained should be suppressed...Id. at 446; also see Giglio v. United States, 405 U.S. 150 (1972).

Here we must ask, if an issuing judge learns that there had been prior wiretap applications and orders involving the same persons or premises, might he not decide not to issue the Government's application. He would ask: Was the prior tap legal? Did the Government use any of the fruits of the prior tap? Is it necessary to intercept individuals or premises that had been subject to prior interceptions?

In this instant case, for example, if the Court knew of the 1972 Statewiretaps and the resulting arrests, the court might have decided against the more intrusive invasions of privacy by the use of a bug. (See Point I,C.)

The issue is whether the Government complied with Title III, not whether non-compliance was harmless.

Writing in dissent in Donovan, Justice Marshall noted in passing the importance of Section 2518(1)(e):

Section 2518(1)(E) requires that the Government disclose to the Court the history of all prior applications to intercept the communications of anyone named in a warrant application. A history of recent applications would at the least cause a judge to consider whether the application before him was an attempt to circumvent the restrictive rulings of another judge or continue an unjustified invasion of privacy. (citing United States v. Bellosi, supra) The decision whether to issue the warrant would certainly be affected by such considerations. United States v. Donovan, supra, at 3053 (emphasis supplied).

Since Section 2518(1)(e) is a stringent pre-condition to the issuance of an interception order, then the fact that the Government may not have intentionally failed to comply with this Section was irrelevant. There was no excuse for non-compliance.

This issue must be read with Point II in that the Court in its ruling on the Motion to Suppress was reviewing his own state of mind. This subjective approach allowed the Government to present evidence at the hearing on the Motion to Suppress that the information from the 1972 State wiretap was not used in the applications

in the instant case. This issue was not necessary or relevant. The Court's inquiry should have been only an objective one as to compliance or non-compliance with the statutory requirement.

POINT I.

- B. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED ON THE GROUND THAT THE GOVERNMENT'S AFFIDAVIT FAILED TO ESTABLISH THAT OTHER INVESTIGATIVE PROCEDURES HAD BEEN TRIED AND FAILED OR WOULD REASONABLY APPEAR TO BE UNLIKELY TO SUCCEED IF TRIED OR WOULD BE TOO DANGEROUS

Title 18, Section 2518(1)(c) of the United States Code requires the Government to establish in its affidavit in support of an interception order that alternative investigative techniques have been tried and failed or would be unlikely to succeed or be too dangerous. In an attempt to comply with this requirement, the Government submitted an affidavit signed by Agent Santacroce. At pages 33-34 of the affidavit dated December 16, 1974, Agent Santacroce alleges five reasons why alternative investigative techniques will not succeed:

1) search warrants would be useless because gambling records are too sketchy or vague; 2) the informants referred to in the affidavit refuse to testify; 3) grand jury immunity will not elicit the necessary information; 4) telephone toll call records are of limited use; 5) the use of undercover agents is not feasible.

As we have noted elsewhere in this brief, the Supreme Court in United States v. Giordano, 416 U.S. 505 (1974), has made it clear that procedural steps required by Title III require strict adherence. Boilerplate language, drafted by some Justice Department lawyer in Washington, will not do. This principle was recognized by one of the few post - Giordano cases dealing with this issue. In United States v. Kalustian, 529 F.2d 585

(8 Cir. 1976), the court ordered the suppression of the fruits of a wiretap on the ground of non-compliance with Section 2518(1)(c). The court was of the view that the Special Agent's affidavit, which is strikingly similar to Agent Santacroce's affidavit, was too conclusory and did not supply enough detail.

The affiant in the Kalustian case was of the view that alternative methods would not succeed for many of the same reasons advanced by Agent Santacroce: 1) informants named in the affidavit refuse to testify; 2) telephone toll call records are of little use; 3) physical surveillance and obtainable records will provide little information; 4) searches and gambling raids have been unsuccessful because records are not kept or are destroyed or are vague and difficult to interpret.

The Court in Kalustian noted that:

"Title III was written to create limited authority for electronic surveillance in the investigation of specified crimes..... Within our prescribed limits... the utmost scrutiny must be exercised to determine whether wiretaps orders conform to Title III. The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny... The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government need show only the probability that gambling is afoot to justify electronic surveillance. Title III does not support that view..." Id. at 588-589.

The Activities of ATF Agent Conforti

The boilerplate nature of Agent Santacroce's affidavit is best illustrated by his allegation concerning the use of under-

cover agents. As is noted above, Agent Santacroce alleged that the use of undercover agents was not feasible because of the difficulties of gaining the confidence of the targeted suspects and gaining entry into 103 New Britain Avenue.

Within one month after the termination of the January, 1975 interceptions, Agent Stanley Conforti of the Bureau of Alcohol, Tobacco and Firearms commenced an investigation into the possible violations of Title 26, Section 72.1 of the United States Code. (Vol. IV, p. 450; Vol. V, p. 524) That section prohibits the acceptance of gambling wagers without the payment of taxes on the monies accepted. In May, 1975, Conforti commenced his field investigation and by July or August was able to enter and place bets at 103 New Britain Avenue. (Vol. IV, p. 449 & 445) During the period August to December, 1975, he was in the premises on approximately fifteen occasions. (Vol. V, p. 504) The Agent would remain in the premises on these occasions from five to thirty minutes. He could have remained in the premises for longer periods of time if he so desired and could have entered 103 New Britain Avenue on more than fifteen occasions. (Vol. V, p. 504).

On a number of these occasions when he was in 103 New Britain Avenue, Conforti was accompanied by a Government informant. (Vol. V, p. 497) There were a number of occasions when Conforti gained entry into 103 New Britain Avenue when the door to the premises was unlocked or wide open. (Vol. V, p. 499 & 501) Once in the premises, Conforti was free to walk around and observe the actions of others. (Vol. V, p. 500)

Conforti placed numerous bets with the target of the wire-tap order, Michael O'Brien. (Vol. IV, p. 461) At one point, O'Brien offered Conforti the opportunity to take part in the gambling operation. (Vol. V, p. 502) Specifically, O'Brien offered to pay Conforti a percentage of any bets that he could bring to him. The offer was made in late August or early September, 1975 and Conforti in fact implemented the arrangement by bringing in monies representing fictitious bets. (Vol. V, p. 502)

In the course of his investigation, Agent Conforti placed bets with a number of persons and was able to determine that Gordon Greenwood, Pat Guglietto, "Cavie" Cavallero and unknown persons were associated with the O'Brien gambling business at 103 New Britain Avenue. (Vol. IV, p. 460) In addition, Conforti placed wagers with John LeConche, Victor Parente, Michael Chiarizo, Ernest Verdone, Elliot Leff, Gordon Greenwood, and John Castagna. In addition an informant working with Conforti placed bets with Ralph or Frank Irace. (Vol. IV, pp. 460, 463, 464, 466-68; Vol. V, p. 497)

Conforti also observed the following persons inside of 103 New Britain Avenue: Michael O'Brien, Gordon Greenwood, "Cavie" Cavallero, Pat Guglietto, Ronnie LeConche, Michael Chiarizo, John Castagna, John Sullivan, Anthony Volpe and Ralph or Frank Irace. (Vol. IV, pp. 455, 460, 462, 464, 467-68; Vol. V, pp. 477-48 & 497)

At pages 27-31 of his affidavit, Agent Santacroce listed nine targets of the investigation who either placed bets with Conforti or were seen by him at 103 New Britain Avenue: Ralph J. Irace, Ronnie LeConche, John X. LeConche, Elliot Leff, Michael T. O'Brien, Victor A. Parente, John F. Sullivan, Ernest N. Verdon, Jr. and Anthony D. Volpe.

As we noted, Agent Conforti's purpose in conducting this investigation was to develop facts which would lead to prosecutions for violations of 26 U.S.C. Section 7262. (Vol. V, p. 524) He was not concerned with violations of 18 U.S.C. Section 1955 which were primarily within the jurisdiction of the F.B.I. (Vol. V, p. 525) Nevertheless, Agent Conforti was able to develop facts that the gambling business at 103 New Britain Avenue involved five or more persons and remained in substantially continuous operation for a period of thirty days. (Vol. IV, p. 456) Thus despite the fact that Agent Conforti was working without the resources of the F.B.I. and had a limited objective, he was able to penetrate the gambling operation at 103 New Britain Avenue, enter the premises on fifteen occasions, make acquaintance with the central target of the wiretap order, Michael O'Brien, and make out a 1955 violation. We would finally note that Agent Conforti could have continued his activities beyond December, 1975. For some reason, he was ordered to stop. (Vol. V, p. 526) Had he been able to continue, and had he been directed to develop a full scale 1955 conspiracy, there is little doubt based on his past successes that he would have accomplished the objectives.

In light of Agent Conforti's activities, Agent Santacroce's claim that "the use of undercover agents is not a feasible investigative technique" is revealed for what it really was: a boilerplate allegation suggested by some Justice Department lawyer.

POINT I.

- C. THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED ON THE GROUND THAT A JOINT APPLICATION BY THE GOVERNMENT FOR THE SIMULTANEOUS INTERCEPTION OF BOTH WIRE AND ORAL COMMUNICATIONS IS NEITHER AUTHORIZED NOR CONTEMPLATED BY THE STATUTE

The novel question is presented in this matter of whether the procedure outlined in Title III for the issuance of wiretap orders for particular premises provided a basis for simultaneously obtaining authority to install an oral eavesdropping device in those same premises without an additional showing of need. In view of 1) the disjunctive statutory language; and 2) the greater constitutional intrusion involved in the interception of face-to-face oral conversations, it is clear that the Government's joint application exceeded the permissible scope of Title III and the fruits derived therefrom must be suppressed.

Section 2516 of Title 18, U.S.C., captioned "Authorization for interception of wire or oral communications" provides in pertinent part as follows:

- (1) "...and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications..." (emphasis supplied).

The use of the word "or", being strictly of a disjunctive nature, is significant in the context in which it appears. As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. 82 C.J.S. Statutes Sec. 335 (1953). Here, the disjunctive "or" sets off "wire" from "oral" communications in a way designed to demonstrate that the two kinds of communications referred to are not interchangeable. This interpretation is reinforced by reference to the long-recognized principle of statutory construction, to wit, penal statutes are to be strictly construed and are not to be extended by implication. Dennis v. Shaw, 137 Conn. 450 (1951). To do otherwise in the circumstances here presented would be tantamount to broadening in the narrowly prescribed scheme established by the Congress for the control of electronic eavesdropping. See generally, United States v. Giordano, 416 U.S. 505 (1974); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975)

Further justification for suppressing evidence obtained from the wiretaps and "bug" used in this case can be found in a brief review of Supreme Court Decisions in the area of electronic surveillance. Starting with its first wiretap case in 1928, Olmstead v. United States, 277 U.S. 438 (1928), the Court recognized the distinction between an interception of a telephone conversation, normally accomplished without an entry into private premises, and an electronic bugging, deemed more offensive because of the likelihood of a greater invasion of privacy. Thus in

Goldman v. United States, 362 U.S. 129 (1942), the Court found that a listening device placed against the outside of an office wall did not violate the Fourth Amendment because there was no physical trespass. However, in Silverman v. United States, 365 U.S. 505 (1961), an eavesdropping accomplished by a foot long "spike mike" driven into premises occupied by defendants was invalidated because of the "actual intrusion into a constitutionally protected area".

The decision in Katz v. United States, 389 U.S. 347 (1967) rejected the rationale of physical trespass as the criterion by which the legality of electronic surveillance was to be determined. That bugging, however, involves the ultimate invasion of privacy by placing "...a government agent in the bedroom, in the business conference, in the social hour, in the lawyer's office..." (concurring opinion of Mr. Justice Douglas in Berger v. New York, 388 U.S. at 64) cannot be seriously disputed. In this case, the Government made no showing in its application for authority to intercept wire communications that electronic devices other than the wiretap were necessary to accomplish the purpose of the investigation. Indeed, the testimony of Special Attorney Paul Coffey at the hearing on the defendants' motion to suppress made clear that no evidence derived from the bug was presented to the Grand Jury which returned indictment Criminal No. H-76-37. In short, the Government merely "piggy-backed" its wiretap application in order to secure authority for the oral interception device. Such a procedure violates the plain language of Section 2516 providing

alternate means of intercepting conversations. Moreover, in view of the grave concern evident in Congress' treatment of the interception of oral communications, see 18 U.S.C. Section 2511(1)(a)(b) (1970); S. Rep. 1097, supra, at 91-92, 161 (indicating the views of Mr. Long and Mr. Hart), it would seem that some threshold showing demonstrating a need for and justifying the greater invasion of privacy occasioned by a bug is required before such authority can be granted. In any event, the application for an oral listening device must be separate and distinct from any request for wiretap authorization and the failure to so separate the two applications in this case is fatal.

POINT I.

D. THE MOTION TO SUPPRESS HOULD HAVE BEEN GRANTED DUE TO THE CONDUCT OF THE GOVERNMENT IN FAILING TO FOLLOW THE COURT'S INSTRUCTIONS AND IN ENGAGING IN A SERIES OF UNAUTHORIZED SURREPITIOUS ENTRIES

D(1) THE FAILURE BY THE GOVERNMENT TO ADVISE THE COURT THAT THE WIRETAP COULD BE CONNECTED TO A POLE BEHIND 96 NEW BRITAIN AVENUE VIOLATED THE COURT'S INSTRUCTIONS AT THE DECEMBER 19, 1974, IN CHAMBERS HEARING

Section 2518(2) of Title 18 provides:

"The judge may require the applicant to furnish additional testimony on documentary evidence in support of the application."

This was done by the Court concerning installation of the wiretap and clearly was not complied with. As a result the District Court was denied access to all the facts involving the connection and installation of the bug and tap. Had the Court known of the information requested it very well may have ordered only the installation of the wiretap and not the bug.

The testimony and discussions between Judge Clarie and Special Agent Santacroce and Attorneys Coffey and Casey at the in chambers hearing of December 19, 1974, have been set out already herein (POINT I. supra). At the conclusions of this hearing Agent Santacroce asked the Court:

"If I might make an inquiry, your Honor?
At this time the phone company is trying to determine if what I described on the pole and lease wire is possible. Now, in the event that they find it is not possible for us to implement service of the microphone, they may be able to say you can implement service while you are on the phone at a distant location. But, not the microphone, through some technical problem.

I was wondering where we would stand at that point."
(emphasis supplied) (p. 13)

The Court made the following response:

"The Court: When will you know about the microphone?

The Witness: Hopefully sometime this morning.
They are checking on it now. (emphasis supplied)

The Court: I think wisdom would dictate that we adjourn this hearing and put that information on the record.

Mr. Coffey: Okay."

These statements by Agent Santacroce contradict the testimony of Mr. O'Connor of SNETCO that Agent Puckett advised him on December 18th that it was not feasible to connect the wiretap to the box on telephone 2602 behind 96 New Britain Avenue. (Vol. V, p. 611, 613-614). In view of Agent Santacroce's comments, it is more reasonable to conclude that the decision not to use pole 2602 was made sometime during December 19th, probably after the in chambers hearing. In any event, it is apparent that the information concerning the availability of pole 2602 was never "put on the record" as ordered by the Court.

Based on this in chambers discussion the Court was reluctant to order a surreptitious entry if other means were available to connect the interception devices. Had the Court known that the wiretap could have been connected to pole 2602 but not the bug, it may have ordered the connection of the tap alone.

The testimony of Mr. O'Connor amply demonstrates that vacancies could have been created on ~~the box~~ at pole 2602 so as to make connection of the wiretap possible. Agent Puckett felt

that connection to the pole was not feasible because a wire would have to be strung across New Britain Avenue to connect the bug. This was not a decision to be made by Agent Puckett; it was a decision to be made by the Court.

There apparently was another reason why the connection to pole 2602 was not fully explored and reported to the Court. Once again, we quote Agent Santacroce at the December 19th hearing:

"And in speaking to Mr. O'Connor in the Telephone Company this morning, he was of the opinion that if we had permission to go into the premises at 99 New Britain Avenue, it would be a lot easier than for them to have to do what they would have to do to implement this, time-wise, particularly. They would have to do quite a bit of work, evidently to do it." (Vol. I, 12-19-74, p. 5-6) (emphasis supplied)

The violation of the Court's instructions on a critical area such as this required suppression of the fruits of resultant electronic eavesdropping.

POINT I

D(2) TITLE III DOES NOT, EITHER EXPRESSLY OR IMPLIEDLY, AUTHORIZE A COURT TO ORDER SURREPITIOUS ENTRIES.

The position of the District Court in its Memorandum on the Motion to Suppress was essentially that once probable cause to issue an intercept order was found, implicit in the Court's order is the authority to covertly enter. In arriving at this position the Court finds an intercept order analogous to a search warrant.

Presently there has been much recent litigation concerning the statutory and/or constitutional problems raised by

surreptitious entries of a place to be bugged for the purpose of planting and servicing the bug. United States v. Scafidi, 564 F.2d 633 (2nd Cir.1977); pet. for cert. filed; United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976) cert. denied, 429 U.S. 1045; United States v. Finazzo, 429 F. Supp. 803 (E.D. Mich. 1977) (Gov'ts. appeal to 6th Circuit argued on 12/17/77); United States v. Dalia, 426 F. Supp. 862 (D.N.J. 1977) (awaiting decision of Third Circuit); In Re U.S.A., 563 F.2d 637 (4th Cir.1977); United States v. Ford, 553 F.2d 146 (D.C. Cir.1977)¹; See also, McNamara, The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After The Court Says "Yes"?, 15 Amer. Crim. L. Rev. 1 (1977).

There is nothing in Title III which grants a court the authority to order surreptitious entries. Here, of course, no such order was entered. Absent specific language by Congress it seems to find such authority implied as the District Court and the Courts in some of the cases above have done is ignoring several important factors.

Congress had sufficient background and adequate discussion of the philosophy of electronic surveillance before it passed Title III. Other State statutes enacted both before, and since Title III, provided a specific provision for such entry. See Connecticut General Statutes, §51-41 (c)(10), enacted 1971, and §54-41(e)(10) (enacted 1971).

¹Co-counsel on this appeal informed lead counsel at this writing that no further action has been taken on Ford. However, Government counsel stated that certiorari had been granted in Ford, which could not be verified as of this writing.

Various other Federal statutes and rules in the area of entry, and search and seizure, clearly recognize the need to present exigent circumstances to a neutral magistrate and have his specific approval in the warrant of procedures necessary to those particular circumstances. See Rule 41 (c) (1) and (h), Federal Rules of Criminal Procedure, concerning "nighttime" search authority; 18 U.S.C. §3109 concerning authority to knock, state notice of authority and purpose, and when proper to break into premises in warrant, 21 U.S.C. 879, drug "search warrants."

Yet, the Government would have us find in our area of the most serious invasion of the privacy of one's conversations, Congress passed no specific provision on covert entries to implant tapping and bugging device, but rather was silent because such authority was implicit in the Court's finding of probable cause to intercept.

This question is not unlike that raised in the recent case of G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977). There the Court considered two separate Fourth Amendment issues raised by the conduct of IRS agents who had attempted to levy on the property of a fugitive taxpayer in order to satisfy his outstanding tax liability. The Court found unreasonable a warrantless entry into G.M.'s office and suppressed the books and records seized therein. It specifically rejected the Government's arguments that 1) warrantless intrusions into private premises were constitutional if done for purposes of

enforcing the tax laws; 2) business premises were entitled to less protection under Fourth Amendment than private homes; and 3) the statute under consideration [26 U.S.C. 6331(b)], which authorized "distrain and seizure by any means," contemplated warrantless invasions into constitutionally protected areas.

This decision is particularly relevant here. The Court held that to adopt the Government's view of the statute would raise serious questions about its constitutionality and would be tantamount to giving "carte blanche for warrantless invasions of privacy." Here the Government is urging a statutory interpretation of Title III similar to that rejected in G. M. Leasing Corp., to wit, that the authority to conduct electronic surveillance pursuant to a Title III order clothes the government with the authority to surreptitiously enter private premises for the purposes of installing the necessary recording equipment. As in G.M. Leasing Corp., supra, there is no legislative history to support that interpretation and the appellants submit such a construction is contrary to basic Fourth Amendment principals.

We would respectfully ask this Court to reconsider its decision in Scafiti and to adopt the well-stated dissenting opinion of Judge Lay in United States v. Agrusa, supra, pp. 702-704; and that of Judge Smith in Scafiti, supra, at p. 645.

POINT I

- D.(3) THE FAILURE OF THE COURT ORDER TO AUTHORIZE SURREPTITIOUS ENTRIES AND TO CONTROL THE DISCRETION OF THE AGENTS RESULTED IN THE ILLEGAL INSTALLATION OF THE WIRETAP AND MICROPHONE.

ENTRIES INTO 99 NEW BRITAIN AVENUE AND
11 JULIUS STREET WERE NOT AUTHORIZED
BY THE COURT'S ORDER OF DECEMBER 16, 1974

The Court's order of December 16, 1974, was very specific in its authorization to intercept conversations "from the telephone subscribed to by O'Brien-Sullivan Home Improvement Company, 103 New Britain Avenue, Hartford, Connecticut, and bearing telephone number 247-6309 and the premises located at 103 New Britain Avenue, Hartford, Connecticut." When the Government realized it could not connect the wiretap and bug, it met with the Court in chambers on December 19, 1974, at 10:10 a.m. and presented a proposed order. Since the proposed order has been lost, its contents are uncertain. However, from the transcript of the December 19th hearing, it can be reasonably concluded that the proposed order requested authority to enter 99 New Britain Avenue and 11 Julius Street. Of course 11 Julius Street had already been entered by agents on December 17th and 18th.

Agent Santacroce testified at the December 19th hearing that:

"...it is also necessary for us to go into 11 Julia (sic) Street, which is this whole entire common basement, in order to hook up on the box where our microphone wires come into. So it would be going into both 99 New Britain Avenue and 11 Julia (sic) Street to get to that box. (Vol. I, 12-19-74, p. 9)

The fact that the proposed order requested permission to enter 11 Julius Street is supported by the fact that the January 16, 1975, order authorized exactly such an entry. Since the Government failed to preserve the order it had the burden of establishing its claim that only an entry into 99 New Britain Avenue was requested. United States v. Miranda, 526 F.2d 1319 (2 Cir. 1975); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); United States v. Augenblick, 393 U.S. 348, 355 (1969). This it failed to do.

The Entry Into 99 New Britain Avenue.

On December 19th, the District Court refused to sign the order authorizing entry into 99 New Britain. Instead it ordered the Government to determine whether alternative methods of connecting the tap were available and to report to the Court concerning their findings. The Government ignored this request. At approximately 2:00 p.m., Agent Puckett and a telephone repairman entered 99 New Britain Avenue and by fraud and misrepresentation entered the enclosed area. This entry constituted a trespass, a violation of the Fourth Amendment requirement that places to be entered be described with particularity and, as we noted above, a violation of this Court's order.

The Restatement Of Torts reviews the applicable rules of trespass when assent to enter ones property is fraudulently obtained. Restatement Of Torts at 415-419. The general rule is that "assent of the possessor of land fraudulently obtained or acted upon by the actor is not a consent to his entry thereon." Id at 415 A conscious misrepresentation as to the purpose for which admittance to the land is sought, may be a fraudulent misrepresentation of a material fact. Id at 416.

An example of misrepresentation supplied by the Restatement also has unique applicability to our case. As we noted in our statement of the facts, infra, Agent Puckett did not identify himself as a member of the F.B.I., but let the owners of John's Delicatessen believe he was with the telephone company. The Restatement, by way of the following illustration would categorize Agent Puckett as a trespasser.

A, a surgeon, is called to B's house to attend her at the birth of a child. A brings with him C, whose sole purpose in coming is to satisfy his curiosity. B, who believe that A has brought C as his assistant, raises no objection to C's presence in the room during the birth of her child. C is aware that B's consent is given because of this mistaken belief. C is a trespasser on B's land. Id at 416

The Fourth Amendment requires that "Warrants shall....particularly describe the place to be searched and the persons or things to be seized." The proposition that an entry into areas or addresses not authorized by the search warrant is illegal needs no citation. Of course, Title III surveillance is a search and constrained by the Fourth Amendment. A case factually similar to ours is United States v. Harris, 365 F. Supp. 261 (M.D. Ohio

1972). There the premises in question consisted of a residential three family dwelling with three addresses, 9807 Dickens Avenue, 9809 Dickens Avenue and a third address not apparent from the record. As here, the Government agents knew the physical configuration of the house and the fact that it was occupied by three different families. The assigned street address numbers were visible, apparent and posted above each front door entranceway. In granting the motion to suppress, the Court said this:

....the Court is constrained to conclude that the agents being aware of the facts and circumstances surrounding the physical configuration of the residential dwelling here in question, and the fact that it was occupied by three distinct families, their failure to particularly describe the place to be searched and thereafter searching the entire building constitutes an illegal search and consequently an illegal seizure. In light of the foregoing, defendant's Motion to Suppress must be sustained. Id. at 262

To the same effect is United States v. Kaye, 432 F.2d 647 (D.C. Cir. 1970) where the defendant's apartment was searched under a warrant which authorized the search of the defendant's store. Defendant's apartment was above the store, had no access to the store and had a different address from the store. The court found the search illegal and suppressed the fruits of the search.

The Entry Into 11 Julius Street

After the December 16, 1974, order was executed, the Government found itself in an awkward position. The agents entered

11 Julius Street on a number of occasions without any authorization in the Court order to do so. To deal with this problem, the Government filed its January, 1975 extension application, and within the application, inserted language authorizing entry into 11 Julius Street. On January 16, 1975, the Court held an in chambers hearing on the January application. The Court inquired why the application and not the order contained language authorizing entry into 11 Julius Street. (Vol. II, 1-16-75, p. 5) The Government was reluctant to accede to the Court's suggestion that the order contain the same language. (Vol. II, 1-16-75, p. 6) However, when the Court insisted that language be inserted in the order authorizing entry into 11 Julius Street, the Government complied. (Vol. II, 1-16-75, p. 6).

We contend that if it were necessary to include this authorization in the January 16, 1975 order, it was just as necessary to include it in the December 16, 1974 order. Entry into 11 Julius Street in December, 1974 absent Court authorization amounted to nothing more than a warrantless entry.

The decision by the Sixth Circuit in United States v. Carriger 19 Cr. L. 2498 (September 15, 1976) supports our view that the entries into 11 Julius Street in December were trespassory and violative of the Fourth Amendment. In Carriger, federal agents trialed a suspected drug pusher from his home to an apartment building. The agent managed to peacefully enter the common entrance way of the building and followed the suspect down a common

stairwell. A number of items were seized in the course of the suspect's arrest including a shopping bag found on the stairwell.

In ordering the suppression of the contraband, the court held that entry into the building was a trespass and violation of the Fourth Amendment:

We believe that the Supreme Court determination [in Katz] that the "trespass" doctrine could "no longer be regarded as controlling" was intended to expand the protection afforded by the Fourth Amendment.***Accordingly, we are of the view that Katz, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy. Although we do not hold today that any evidence gained as a result of a federal agent's trespass constitutes an illegal search and seizure, we believe it is helpful to rely on property concepts "simply because they assist in establishing the perimeters of the Fourth Amendment as they relate to the home." Fixel v. Wainwright, 492 F.2d 480, 483 n.3 (5th Cir.1974).***

The officer's entry into this locked apartment building without permission and without a warrant of any kind was an illegal entry and violated appellant's Fourth Amendment rights. Accordingly, the evidence obtained as a result of the unauthorized entry should have been suppressed.

We cannot agree with the district court that McDonald [v. U.S., 335 U.S. 451] may be distinguished upon the basis that it proscribed a forcible entry into an apartment building while the entry here was peaceable. Whether the officer entered forcibly through a landlady's window or by guile through a normally locked entrance door, there can be no difference in the tenant's subjective expectation of privacy and no difference in the degree of privacy that the Fourth Amendment protects. A tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers.***

(The Supreme Court's recent decision in United States v. Santana, 19 CrL 3141 (1976), held that a person who stands in a doorway leading to the vestibule of a house, is located in a "public place" for purposes of the Fourth Amendment. That decision does not hold

that tenants in an apartment building or residents in other multifamily dwellings surrender their expectation of privacy in locked common areas of the building from which members of the general public are excluded.)***

The facts in our case, of course, constitute a more serious intrusion into privacy than was the case in Carriger. The F.B.I. agents not only entered 11 Julius Street, but they entered it surreptitiously by breaking and entering. These actions were not authorized by the Court, an issue to which we now turn: see discussion of United States v. Ford, 414 F.Supp. 879 (D.C. 1976) infra.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 U.S.C. Section 2510 et seq. sets forth a stringent, detailed procedure for the control and limitation of all electronic surveillance. The scheme embodied in Title III was intended to meet the constitutional standards mandated by the decisions of the Supreme Court in Katz v. United States, 389 U.S. 347 (1967) and Berger v. New York, 388 U.S. 41 (1967), where Mr. Justice Clark, on behalf of the Court, observed that "few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." Id. at 63. In this case, the continuing pattern of unauthorized, surreptitious entries into premises owned, leased or operated by defendants violated both the letter and spirit of Title III to such an extent as to require suppression of the evidence obtained thereby.

Section 2515 of Title 18, U.S. Code, prohibits the receipt in evidence of any intercepted wire or oral communication"... if the disclosure of that information would be in violation of this chapter." Section 2518(10)(a) provides a means of implementing the 2515 sanction by directing that a motion to suppress shall be granted whenever, inter alia," (iii) the interception was not made in conformity with the order of authorization or approval." This is precisely the situation in this case where, according to the testimony, agents of the F.B.I. made numerous clandestine entries into 11 Julius Street, 103 New Britain Avenue and 99 New Britain Avenue for the purpose of installing, checking or otherwise monitoring electronic eavesdropping equipment. While the use of such equipment was authorized by this Court's order of December 16, 1974, repeated entries into constitutionally protected areas and the "compromising of locks" was not. Accordingly, the interceptions were not made in conformity with "the order of authorization or approval" of this Court and the fruits derived therefrom must be suppressed.

The legislative history of Title III makes clear that the opinion of the Supreme Court in Berger v. New York, 388 U.S. 41 (1967), served as a guideline to the drafters of Title III and they tried to comply with the constitutional requirements set forth therein. S. Rep. No. 1097, 90th Cong. 2d Sess., 1968 U.S. Code Congressional and Administrative News, pp. 2153, 2161-62, 2191. In Berger, supra, a conviction for conspiracy to bribe obtained through a court ordered eavesdrop was reversed because of constitu-

cional infirmities in the New York State eavesdropping statute. The majority opinion set forth the constitutional standards which the statute in question failed to meet, including its failure to limit the discretion of the police officer executing the eavesdrop order.

In this case, too much was left to the discretion of the Government agents charged with the responsibility of carrying out this Court's order authorizing the interception of wire and oral communications. Not only did the Court order of December 16, 1974 fail to authorize the kind of secretive, non-consensual entries which took place, but it gave no instructions whatever to the F.B.I. agents as to when and how they were to install the equipment necessary to implement the wiretap order. In short, Agent Santacroce and his fellow agents were free to exercise their collective judgments as to the most efficient way to carry out the Court's instructions, regardless of the magnitude of the constitutional intrusion involved. Moreover, there was no testimony that Strike Force Attorneys in charge of the investigation gave any instructions regarding execution of the wiretap order. Cf. United States v. Bynum, 485 F.2d 490, 501 (2d Cir. 1973), reaff'd after remand, 513 F.2d 533 (2d Cir.); cert. denied. 46 L.Ed.2d 277 (1975) where awareness of minimization required by Assistant U.S. Attorney and instructions to agents were considered part of good faith efforts to comply with statute.

The multiple entries of multiple premises which occurred in this case plainly violated that long-standing Fourth Amendment

requirement that "nothing be [is] left to the discretion of the officer executing the warrant". Marron v. United States, 275 U.S. 192, 196 (1927). Mr. Justice Stewart, writing for the majority in a border-search case, recently stressed the need to circumscribe the unfettered discretion of the officer in the field. United States v. Almeida Sanchez, 413 U.S. 266, 270 (1972). That need is even more manifest where, as here, agents are dealing with premises involving a greater expectation of privacy and accorded greater protection by the Constitution than, for example, that given to a car. Chambers v. Maroney, 399 U.S. 42, 48 (1970). The failure to control in any way the activities of the agents in this case is the substantial equivalent to authorizing general searches of the kind condemned in a long line of cases. See e.g., Stanford v. Texas, 379 U.S. 476 (1965). Such unrestrained governmental conduct was not contemplated by Title III and cannot be tolerated in a free society.

United States v. Agrusa, supra, supports our position. In Agrusa, the District Judge authorized a surreptitious entry into the defendant's business for the purpose of planting a bug pursuant to Title III. By a 2 to 1 decision, the Eighth Circuit upheld the actions of the F.B.I. agents. However, the majority held that such surreptitious actions can only be sustained if there is a specific court authorization to do so:

"We hold that law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement break and enter business premises which are vacant at the time of entry in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III." United States v. Agrusa, 19 Cr. R. 2343.

The order in our case failed to authorize such entries into 103 New Britain Avenue or 11 Julius Street. Therefore, on this ground alone, the motion to suppress should have been granted. In the Fourth Circuit in In Re Application of United States, supra, the Court of Appeals agreed with the federal district judge below that a separate judicial authorization of an entry to plant bugs is required. In Re Application of United States, supra, at p. 644.

As we noted earlier, the Fourth Amendment requires stringent control by the magistrate on the activities of the police. The leading case on such control in our area is United States v. Ford, supra. Ford required carefully limited judicial authorization of an entry to plant bugs, independent of the interception order itself. In that case the Court order authorizing surreptitious entries to plant the bug was found too broad, and required a separate determination of probable cause and reasonableness for each such intrusion onto private property.

The factual situation in the present case is much more extreme than in Ford. Judge Clarie's order did not authorize surreptitious entries; it did not authorize entries into 11

Julius Street or 99 New Britain Avenue, and it did not limit the number of entries or the time of same. In fact, Judge Clarie was never advised that entries were made into 11 Julius Street and/or 103 New Britain Avenue with the use of keys on December 17, 18 (twice), 19, 20 and 30, 1974 in the late night or early morning hours. The Court was never advised that on January 16th and 29th, 1975, similar entries were made. Nor did the Court know of the December 19th, 1974 ruse to get into 99 New Britain Avenue by Agent Puckett and a telephone company repairman. All the Court knew was that if it authorized entry into 99 New Britain Avenue a key would be used. In Chambers Hearing, 12/19/74 at 8, 12. The Court refused to authorize such an entry because "...going into someone else's property with a made key, as a trespasser" could create serious problems. Id. at 12..

Clearly the situation in the present case as to the Court's expressed intentions and instructions, and what the Government actually did in installing the devices, was one that could best be characterized as "out of control." For this reason the appellants' motion to suppress should have been granted by the District Court.

D. (4) THE F.B.I. SHOULD NOT HAVE ENGAGED IN
A SURREPTITIOUS ENTRY AT 103 NEW BRITAIN
AVENUE UNLESS IT HAD FIRST OBTAINED
SPECIFIC AUTHORIZATION FROM THE ATTORNEY
GENERAL OR HIS SPECIALLY DESIGNATED
ASSISTANT

The in camera proceedings and application papers clearly show that specific authorization to intercept wire and oral communications was obtained by the local Strike Force prior to December 16, 1974. These same proceedings and papers are similarly barren of any approval of a surreptitious entry into the New Britain Avenue or Julius Street property, and there is not indication that the subject matter was ever raised with the Attorney General. By contrast, however, the January 15, 1975 letter of Wallace Johnson manifests a great concern over this matter by the Attorney General, and there can be little question a breaking and entry was authorized for the January, 1975 extension. The wording of the letter, however, was cleverly chosen to reinforce the Government's argument that such approval is always implicit when ever the general authority to wiretap is granted. It seems at least paradoxical that the Government on the one hand argues that such specific authorization is unnecessary before an application is made to a judge and, on the other hand, drafts a separate letter for the purpose of approving the breaking and entry. Surely, the Government with its vast experience at tapping and bugging knows that a surreptitious entry is not always a necessary prerequisite to the installation of electronic interception equipment.

No case can be found which deals with the issue involved here. The history and legislative purpose of Title III leads to a conclusion that a violation has occurred. The Second Circuit has held that:

The intent of the proposed provision [2516(1) and 2516(2)] is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officers of the State... United States v. Tortorello, 480 F.2d 764, 777 (2 Cir.) cert. denied, 414 U.S. 866 (1973).

Although discussion 2516(2), the court in Tortorello made clear that the same purpose applies to 2516(1). United States v. Tortorello, supra, at 777, n.9.

Specifically, the legislative history of 2516(1) as found in the Senate Reports shows that Congress was concerned about obtaining approval at the highest level before individual rights were violated.

The provision centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques. Centralization will avoid the possibility that divergent practices might develop. Should abuses occur, the lines of responsibility lead to an identifiable person. The provision itself should go a long way toward guaranteeing that no abuses will happen. S. Rep. No. 1097, 90th Cong., 2nd Session 10 (1968), quoted in 2 U.S. Code Cong. & Adm. News 2112, 2185.

It is the concern about a line of responsibility in case abuses occur that is most relevant here. The District Court itself ex-

pressed concern at the December 16th in camera proceedings about physical harm arising from a surreptitious entry at 11 Julius Street or 99 New Britain Avenue. A shootout with the rightful owners of the premises would be politically embarrassing at the least even if no one was harmed. If such a situation transpired, local F.B.I. officials and Strike Force attorneys could merely point accusing fingers at each other, and high Justice Department officials would be insulated from attack. It would be a simple matter for the Attorney General to repudiate the methods used by Mr. Santacroce and deny prior approval. United States v. Giordano, 469 F.2d 522, 528 (4 Cir. 1972), aff'd. 416 U.S. 505 (1973). By making a high government official responsible for all the details of the wiretap, including surreptitious entry if necessary, Congress intended to establish "clear lines of authority" and "to insure that the awesome power of electronic surveillance be exercised with circumspection." United States v. Giordano, supra. "The mature judgment of a particular responsible Department of Justice official is interposed as a precondition to any judicial order." United States v. Giordano, 416 U.S. 505, 515-516 (1973).

Because of the nature of the encroachment on civil rights which Title III permits, Section 2516 should be applied strictly and violations thereof should result in suppression of the illegal

communications. United States v. Cafero, 473 F.2d 489 (3 Cir.), cert. denied, 417 U.S. 918 (1973); aff'd., 500 F.2d 1401 (3 Cir. 1973). The Supreme Court has read the act to allow suppression of communications which are simply unlawful, even though a constitutional violation may not be present. United States v. Giordano, supra at 527. Similarly, the court has struck down lawful extensions simply because the original order violated Title III. United States v. Giordano, supra at 532; United States v. Wac, 498 F.2d 1227 (6 Cir. 1974).

When the "government becomes a lawbreaker, it breeds contempt for the law." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis dissenting). Only by confining the Justice Department to a strict adherence to the requirements of 18 U.S.C. Section 2510, et seq., will the rights of the citizenry to be free of untrammelled intrusions of privacy be safeguarded. When the Government seeks to illegally enter homes and businesses in the evening hours, the Court should carefully scrutinize the slightest variation from the statutory requirements.

- D. (5) SURREPTITIOUS ENTRIES CANNOT BE MADE ONTO PREMISES OF A LANDLORD OR CUSTODIAN WITHOUT NOTICE TO THEM OR WITHOUT A SHOWING TO THE COURT THAT SUCH NOTICE WOULD JEOPARDIZE THE INVESTIGATION.

We have noted in POINTS I, D. (1) to (3), that neither Title III nor the common law authorizes this court to order surreptitious entries. Alternatively, we have argued that if the Court has such power, its order must specifically authorize such entries. And we now argue that if this Court rejects both of the foregoing contentions, surreptitious entries may not be made onto properties of a landlord, custodian or common carrier without notice to them, unless specific reasons are provided to the issuing judge as to why notice to these persons or companies would jeopardize the investigation.

In 1970, Congress amended Section 2518 to provide as follows:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify...

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant, forthwith, all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian, or other person furnishing such facilities or technical assistance

shall be compensated therefor by the applicant at the prevailing rates. 18 U.S.C. Section 2518(4)"

It has been stipulated that neither the owner of 11 Julius Street, Paul Mozzacato, nor the custodian of John's Delicatessen at 99 New Britain Avenue were notified of the entries into their premises.

The carefully drafted provisions of Title III are designed to accomodate the competing interests of effective law enforcement with the right of privacy. If this Court were to approve of the entries in this case into 11 Julius Street and 99 New Britain Avenue, it would be tearing the fabric from Title III. The District Court recognized the dangers of surreptitious entries; it recognized at the in chambers hearing of December 19, 1974, that the owner of 11 Julius Street or 99 New Britain, or the tenants of the building could mistake the agents as trespassers and shoot them. To prevent this, Section 2518(4) was enacted to insure the cooperation of persons like Mr. Mozzacato and the custodian of John's Delicatessen.

Section 2518(4) authorizes the Government to apply for an order commanding not only a landlord or custodian, but also a telephone common carrier to cooperate. Could the Government, if it suspected that telephone personnel would tip off the wire-tap suspects, go onto telephone property and connect their wire-tap to a SNETCO terminal box without: 1) a showing to the Magistrate that such a procedure was necessary; and 2) without a

specified order that this procedure could be employed? If not, then the same procedure should have been employed with regard to Mr. Mozzacato and the custodian of John's Delicatessen.

At the hearing on the motion to suppress, the Government made a belated attempt to demonstrate that notice to Mr. Mozzacato would have jeopardized the investigation. The evidence to this effect was not persuasive. (Vol. IV, p. 439-446) In any event, the Government should have been precluded from augmenting its application and affidavit at the suppression hearing.

United States v. Roth, 391 F.2d 507, 509 (7 Cir. 1967), United States v. Kahn, 471 F.2d 191, 197 (7 Cir. 1972), reversed on other grounds, 415 U.S. 143, (Vol. IV, pp. 437-438).

POINT I

E. THE JANUARY, 1975 INTERCEPTIONS SHOULD HAVE BEEN SUPPRESSED AS THE "FRUIT" OF THE DECEMBER ORDER

Most of the aforesaid discussion and argument involves various aspects of the December 16, 1974 court order and the implementation of that order, as upheld by Judge Clarie in his Memorandum denying appellants' Motion to Suppress. If this Court were to find that the December order was in violation of Title III or the Fourth Amendment, then the results of the January 1975 tap and bug also must be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). Additionally, most of the aforesaid issues raised have equal applicability to the December and January orders independent of the Wong Sun "fruit" doctrine.

F. THE APPELLANTS' HAD REQUISITE STANDING TO DEMAND THE SUPPRESSION OF THE EVIDENCE.

The District Court found in its Memorandum of the appellants' Motions to Suppress that the defendants lacked the requisite standing, "both under Title III and under the fourth amendment" to challenge the Government's entries into the basement area of 103 New Britain Avenue and into the access area leading from 11 Julius Street, or to challenge the permissive entry into the basement of the delicatessen at 99 New Britain Avenue.

The Court based its holding on the fact that none of the defendant's asserted any inherent possessory rights to these areas. Thus the Court concluded no such interest existed.

We claim the Court erred in its finding in two respects. First, the test of standing here is not one of "interest in the premises" and all appellants had the requisite standing under the provisions of Title III. Second, even if this Court were to adhere to a test related to interest in the premises, the Governments own evidence, claims and theory of the case gave such an interest in the premises at 103 New Britain Avenue and the buildings common areas to both appellants Volpe and O'Brien.

Under 18 U.S.C. §2518(10)(a) an "aggrieved person" has standing to challenge the validity of a wiretap. (Emphasis added). An aggrieved person is one who has had his conversations intercepted during the wiretap or is a person against whom the wiretap was directed. 18 U.S.C. §2510(11). It seems clear that the validity of a wiretap cannot be divorced from the means by which it was implemented, particularly when the Government is claiming, (and the District Court apparently found here) that the authority to implement the order by surreptitious entry is implicit in Title III and the Court's wiretap order. That question of entry and wherein its authority reposes is one of validity of the order and the statute. Any other holding is in the recent words of this Court "artificial". United States v. Scafidi, 564 F2d633, 639 (2nd Cir. 1977); pet. for cert. filed.

This Court in Scafidi held in pertinent part as follows concerning 18 U.S.C. §2510(11):

"that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. See Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (proprietor can object to any unauthorized wiretap; those overheard can object only to their voice being overheard); and Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because the true lessee, his friend, lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry." (Emphasis added)
United States v. Scafidi, at pp. 638-639.

It appears that while the Scafidi panel adheres to the Alderman concept of standing, it felt such a construction as applied to one whose voice was overheard by electronic surveillance was "technical" and "artificial." The meaning of this statutory provision is clear and this Court should abandon the "interest in premises" requirement and following the logical test intended by those who drafted Title III.

Even if this Court were to require an "interest in the premises" to give one standing it is clear from the Government's own proof in this matter that both O'Brien and Volpe had such an interest. The Government at both the hearings on the Motion To Suppress and the trial itself put on a great deal of testimony to show that O'Brien leased the premises; that he and Volpe were partners; that Volpe was seen entering the locked front door on many occasions with his own key and leaving the premises and locking the same door. (Vols. I-IV; Vol. XII, pp. 48, 74-77, 80, 87, 132; Vol. XII, p. 321). The Court clearly erred in ignoring the Government's allegations and evidence on the interests of both Volpe and O'Brien on this point.

POINT II.

THE DISTRICT COURT ERRED IN FAILING TO DISQUALIFY ITSELF
FROM HEARING AND RULING UPON THE MOTION TO SUPPRESS

Prior to the hearing on the Motion to Suppress, and again prior to trial by renewal, the appellants asked Judge Clarie to disqualify himself from continuing to sit on the evidence concerning the suppression issues.

This was not a situation wherein there were defects in the application or authorization papers which occurred prior to or during the electronic surveillance. Rather we were concerned here with the Court's ability to consider subjectively severe critical matters which occurred as the In Camera proceedings progressed and the tap and bug were installed, maintained, and removed.

The Court, by hearing the evidence on the Motion to Suppress, had to ask itself what effect the disclosure of the 1972 State wiretap on O'Brien would have had on it, when in fact the objective fact of such non-disclosure was all the Court should have considered in evaluating such non-disclosure and the statutory maintain of Title III pertaining thereto.

The Court had to consider after the fact the failure of the F.B.I. to comply with the Court's instructions at the December 16, 1974, chambers hearing, to report back on the record on the feasibility of connecting the wiretap to the box on telephone pole 2602 behind 96 New Britain Avenue. Said connection might in practical fact have led to the connection of the tap alone;

rendering the bug implantation and certain entries unnecessary.

Lastly, and most important, the Court expressed grave reservations at the December 19, 1974, chambers hearing about the entries proposed, and requested alternative means to avoid them. Even though the Court demanded to hear reports back on this problem, several hours later the F.B.I. surreptitiously entered to install the devices, and repeated such entries several times thereafter, never reporting back as the Court requested.

Such conduct in the operation of the electronic surveillance and the implementation of the Court's order put the District Judge in a position of hearing evidence and argument to justify conduct that ignored his expressed concerns.

It is clear that normally the judge who issued the surveillance order may also determine challenges to its issuance and execution, the judge may also excuse himself. United States v. Garramone, 374 F.Supp. 256, 258 (E.D.Pa 1974); United States v. Maniello, 345 F. Supp. 863, 882 (E.D. N.Y. 1972); United States v. Zarowitz, 326 F. Supp. 90, 94 (C.D.Cal. 1971).

Due to the unusual circumstances created by the conduct of the prosecutors and the F.B.I. agent in view of the Court's expressed concerns herein, Judge Clarie should have excused himself from the evidentiary hearing and argument on this motion to suppress the fruits of the electronic surveillance.

III. THE DISTRICT COURT ERRED IN DENYING APPELLANTS
VOLPE AND DI BENEDETTO A SEVERANCE AND IN TRYING
THE APPELLANTS VOLPE AND DI BENEDETTO PRIOR TO
THE GAMBLING DEFENDANTS

Background

The severance issues under Rules 14 and 8(a) and (b) of the Federal Rules of Criminal Procedure mainly concern the defendant, Lawrence DiBenedetto. They also concern the defendant, Anthony D. Volpe, on the issue of a joint trial of co-defendants, thereby denying both the defendant, Anthony D. Volpe, and the defendant, Lawrence DiBenedetto, the benefit of exculpatory evidence resulting from their joint trial being held prior to the trials of the other co-defendants. Therefore, the background of the indictment and attempts at severance will be summarized, followed by an individualization of the severance issues that involve the defendant, Lawrence DiBenedetto, and the defendant, Anthony D. Volpe.

The Indictment

A Federal Grand Jury in the United States District of Connecticut indicted twenty (20) defendants in an Eight-Count Indictment in H-76-37 on April 4, 1976. Two of the defendants, Anthony D. Volpe and Michael T. O'Brien, were indicted on a majority of the counts. The Trial Court, on the first day of trial, severed out the Eighth Count which involved Anthony D.

Volpe. However, the defendants, Anthony D. Volpe, Michael T. O'Brien and Lawrence DiBenedetto, went to trial together on May 3, 1977 on the following counts:

Anthony D. Volpe - Counts I, II, III, IV, V.

Michael T. O'Brien - Counts I, II, III, IV, VI, VII.

Lawrence DiBenedetto - Counts III, IV, V.

In addition to Anthony D. Volpe and Michael T. O'Brien, 18 other defendants were indicted. Three were charged with extortion: John Sullivan, Francis J. Campanelle [charged in Count VII with Michael T. O'Brien], and Lawrence DiBenedetto [charged in Count V with Anthony D. Volpe]. The remaining defendants were all charged with Counts III and IV, hereinafter referred to as the Gambling Counts. It should be noted that the Amended Indictment [Count VIII deleted] which went to the jury consisted of 16 pages. Counts I through IV occupied approximately 15-1/2 pages of the Indictment. The number of overt acts listed under the first four counts were as follows:

Count I - 5 (plus other allegations of wrongdoing)

Count II - 37 (plus other allegations of wrongdoing)

Count IV - 24

The defendant, Lawrence DiBenedetto, was mentioned as an unindicted co-conspirator in Count II, and as a defendant in

Counts III and IV. He, of course, was acquitted on Counts III and IV and was not charged on Count II. In the 52 overt acts listed under Count II, the defendant, Lawrence DiBenedetto, was mentioned only once. In Count IV, in which he was acquitted, he was mentioned only one time out of 24 overt acts.

The Pre-Trial History

The Government wanted all 20 defendants tried jointly on the theory that all the defendants are related one way or the other to the criminal enterprise, and therefore severance was not warranted. [Vol. VII, p. 3] However, the Government suggested that if the Court chose to sever, it was the Government's position that the defendants, O'Brien, Volpe, DiBenedetto, Sullivan and Campanelle, be tried together, and all the gamblers [Counts III and IV] be tried together. [Vol. VII, p. 3, 4]

As to DiBenedetto, the Government's argument was that in order to prove Counts I and II against Volpe and O'Brien, they had to prove Counts V, VI and VII, and therefore DiBenedetto should remain in that case as he was part of the gambling business and charged in Count V. He, of course, was acquitted on the gambling charges, and therefore the jury found him not to be part of that business. Furthermore, the underlying debt supporting Count V was owed by George Demirs to DiBenedetto, and had nothing to do with the activities at 103 New Britain Avenue, Hartford, Connecticut. [Vol. XVIII, p. 1116; Vol. XX, p. 1523-26] The Government also argued that DiBenedetto regularly and

consistently participated in the gambling business at 103 New Britain Avenue, Hartford, Connecticut, pursuant to the wiretap conversations. The jury, of course, did not agree with this contention. A review of the entire transcript reveals that approximately 156 telephonic calls (a few were bugged conversations) were played out of some 3,000 interceptions. Approximately 12 calls were played as to the defendant, DiBenedetto. [Exhibits 131 A-L] The Government also urged that the defendants, Sullivan and Campanelle, be tried with the defendants, Volpe, O'Brien and DiBenedetto, as they were charged in Count VII with O'Brien in an extortion. [Vol. VII, p. 4-16]

The Court (Clarie, J.) in the course of making inquiry into the matter, elicited a response from the Government that the defendants, Volpe and O'Brien, are in a group by themselves - e.g., the only two with RICO Counts, and that grouping was followed by the alleged extortionists, DiBenedetto, Sullivan and Campanelle, and another group consisting of the gamblers. The Government admitted that the cases against the defendants, Volpe and O'Brien, were more serious, and it appeared that the Court would end up severing the defendants, O'Brien, Volpe, DiBenedetto, Campanelle and Sullivan, from all of the other gambling defendants. [Vol. VII, p. 17-18]

The defendant, Volpe, objected to that order of trial, as it would deprive him of exculpatory evidence of co-defendants indicted in Counts III and IV, who would take Volpe out of the

gambling business, and urged that the gamblers should be tried first - approximately 15 defendants. [Vol. VII, p. 34-38] The Court accepted the representations concerning the exculpatory testimony of the co-defendants on behalf of the defendant, Volpe; and relied on the same; and still denied a change in the order of trials. [Vol. VIII, p. 56]

The defendant, DiBenedetto, objected to being tried with the defendants, Volpe and O'Brien, as they were involved in all eight counts, and pointed to the infrequent mention of the defendant, DiBenedetto, in the overt acts as compared with the defendants, Volpe and O' Brien, who were invariably mentioned.

[Vol. VII, p. 44-45]

The Court, in late March or early April, severed the gambling defendants from the defendants, Volpe, O'Brien, DiBenedetto, Sullivan and Campanelle, and the defendant, Volpe, renewed his Motion for Severance and a new order of trial. [Vol. VIII, p. 33] The Court (Clarie, J.) did not change its decision to try the latter group first. The defendant, Volpe, then argued that the order of trial denied him of exculpatory testimony from the defendants, DiBenedetto, O'Brien and Sullivan, and six gambling defendants. [Vol. VIII, p. 34-35] The Court did not alter the order of trials, but did sever Campanelle and Sullivan due to a potential conflict of interest between Sullivan and Volpe, but denied Volpe's motion. [Vol. VIII, p. 50-55, 64] The defendant, DiBenedetto, also moved to be severed and tried with Campanelle and Sullivan as they involved extortion counts, and the Court

denied his motion. [Vol. VIII, p. 65-71]

It appears that the Court (Clarie, J.) relied heavily on the Government's representation that the defendant, DiBenedetto, was in the heart of the gambling operation [Vol. VIII, p. 67-70] and rejected the defendant's attorney's contention that the tapes did not show it. The Court, (Clarie, J.) also rejected the argument that the nuances of a conspiracy to use implicit threats in an extortion conspiracy required a separate trial without days and days of evidence on the gambling operations. [Vol. VIII, p. 57-60] The jury agreed with DiBenedetto's attorney as regards his role in the gambling operation as they acquitted him of those charges. Thus, it appears that the Government's main argument for the joinder lacked merit, as he was not heavily involved with the operation and laying off of bets and wagering with the gambling operation. [Vol. VIII, p. 57-60, 65-71]

Subsequently, the defendant, DiBenedetto, filed a written Motion for Severance and argued it on April 26, 1977 before the Court (Clarie, J.) who denied the motion. [Vol. VIX, p. 14] It was urged that no jury could separate all the evidence, but would view the indictment and counts as one continuous transaction - i.e., an ongoing enterprise. The defendant, DiBenedetto, was charged with only three counts, but the jury would see all three defendants, Volpe, O'Brien and DiBenedetto, seated together and hear all of the evidence offered on the eight counts involving Volpe and O'Brien, with the lion's share of the evidence

being offered against Volpe and O'Brien and not being offered as to DiBenedetto. The defendant, DiBenedetto, also argued that the joint trial deprived him of his constitutional right to obtain exculpatory evidence of co-defendants as a result of the joinder. Furthermore, he would be forced to devote the entire trial to separating himself and the Government's evidence from the defendants, Volpe and O'Brien. Finally, he would be tried in connection with the distasteful RICO counts that he was not charged in. [Vol. VIX, p. 11-14]

Post Trial

The defendants made numerous Motions to Sever during the course of the trial, which will be detailed in the argument portion of the brief. However, the defendants, Volpe and DiBenedetto, both filed Motions for Judgment of Acquittal and for a New Trial, which motions were heard by the Court (Clarie, J.) on July 5, 1977 and were denied. Those motions dealt, inter alia, with the severance and order of trial issues. [Vol. XXV, p. 35]

The defendant, Volpe, argued that the lack of severance, and particularly the order of trial, mandated that he go on trial with O'Brien and DiBenedetto involving specific acts of extortion and the collection of gambling debts that he was not involved in. Furthermore, there was no bugging or wiretap evidence showing his involvement. However, there was evidence introduced involving the Hames, Rydel, Palangio and Barresi extortions. This evidence

came in when he was being denied exculpatory evidence from co-defendants that he was not part of the gambling operation. He was foreclosed from presenting that exculpatory evidence due to the order of trial, when that evidence could have cleared him of the gambling counts and the Count V conspiracy to commit extortion, which counts formed the basis for his conviction on the first two RICO counts. [Vol. XXV, p. 1-22]

The defendant, DiBenedetto, also argued the severance issues. He pointed out the patterns or methods employed in the extortions that he was not charged in (Hames, Rydel, Palangio and Barresi) were put into evidence which were not offered as to him, but which the jury heard. This later allowed the Government to argue the pattern of "good guy, bad guy", "it's out of my hands" types of similarity in all these extortions, all of which created a bad aura and atmosphere in which to try the defendant - i.e., a spill-over effect. It was argued that a separate trial would involve only four or five telephone calls, and two witnesses, which would take approximately two trial days. In a separate trial he could call the defendant, Volpe, for exculpatory evidence, and would not be involved in a trial with 40 alleged overt acts and other wrongdoing, wherein only one or two could be applicable to Count V. Furthermore, the flavor created by the presence of two RICO counts would not be in front of the jury. Finally, it was pointed out that on a re-trial he might very well testify on the extortion count, as he would not have to incriminate himself regarding his gambling activities, and thus be able to testify as to the particulars of Count V. [Vol. XXV, p.30-35]

POINT I

A. THE DISTRICT COURTS DENIAL OF A SEVERANCE AND A DIFFERENT ORDER OF TRIALS DENIED THE APPELLANTS VOLPE AND DI BENEDETTO THE OPPORTUNITY TO PRESENT EXCULPATORY EVIDENCE AND A FULL DEFENSE

The foregoing Background material adequately sets forth the history of these motions and will not be repeated here.

Joint trials pose three very substantial and distinct dangers to defendants. First, a jury may confuse and cumulate evidence and convict a defendant of one or more crimes when it would not have convicted if it could have separated or segregated the evidence. See generally, Drew v. United States, 331 F. 2d 85 (D.C. 1964). Second, a defendant may be confounded in presenting defenses - i.e., where he wants to testify on one charge but not the other. See generally, Cross v. United States, 335 F. 2d 987 (D.C. 1964). The third danger is that the jury may convict of one crime on the basis of criminal disposition shown in another crime, which evidence would not have been admissible, but for the joined charges. See generally, United States v. Foutz, 540 F. 2d 73 (4th Cir. 1976).

A leading decision in this area, United States v. Echeles, 352 F. 2d 892 (7th Cir. 1965) supports the granting of a severance in a criminal trial due to the prejudice resulting to a defendant by barring his obtaining exculpatory evidence from co-defendants in a joint trial. The joint trial deprived Echeles, an attorney, of the opportunity to call his co-defendant

for exculpatory evidence as to his lack of participation in a perjury/obstruction incident occurring in an earlier criminal trial. Echeles holds that a defendant, unlike a witness, can never be called to the witness stand, either by the government or by the defense. Therefore, Echeles was barred from calling the co-defendant to the witness stand to elicit any testimony whatsoever. Echeles, supra, at 897-98.

The Court of Appeals granted Echeles a new trial on the basis that the denial of his motion for a separate trial was prejudicial to his defense. It also rejected the government's argument that Echeles was speculating that the co-defendant would be tried first, and would not exercise his Fifth Amendment privilege. The Court explained that it would have been proper for the Trial Court to order the co-defendant to trial first, and held that whether or not the co-defendant took the Fifth was Echeles' concern and not the government's. Echeles states:

"Speculation about what Arrington might do at a later Echeles trial understandably would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventuality was not a certainty." [emphasis supplied]

Echeles, supra, at 898.

Thus, the Court held that Echeles should have had the opportunity of getting the co-defendant's evidence before the jury regardless of the credibility of the witness, or the weight of the evidence. Echeles, supra, at 898. See also, Byrd v. Wainwright, 428 F. 2d 1017 (5th Cir. 1970).

A more recent decision, United States v. Shuford, 454 F. 2d 772 (4th Cir. 1971), cites the Echeles decision as the leading case supporting the proposition that a severance is obligatory where one defendant's case rests heavily on the exculpatory testimony of a co-defendant willing to give exculpatory testimony if not in a joint trial. Shuford involved a critical dispute as to the instructions given by an attorney to a physical therapist in the preparation of therapy bills in connection with a Federal Tort Claim. Other than the defendant himself, the co-defendant therapist was the only witness able to controvert the government's proof. Here, Mr. Volpe was willing to give exculpatory evidence denying his involvement in the extortion incident, and was the only person available to contradict the government's witness, Ronald Del Mastro. Mr. Del Mastro was an informer who testified for the government that Mr. Volpe and Mr. DiBenedetto discussed the scaring of Mr. Demirs. Thus, there is a similarity in the Echeles case and Shuford case to the situation at hand, as there were no telephone taps or conversations between Mr. Volpe and Mr. DiBenedetto concerning the Demirs' incident. Furthermore, Mr. Volpe and Mr. DiBenedetto would have testified for each other and contradicted a portion of Mr. Del Mastro's testimony concerning the transaction, which would have been particularly important on the issue of intent and Mr. Del Mastro's credibility. Consequently, their convictions should be reversed on the basis of the denial of this

exculpatory evidence which was excluded due to their being tried jointly. These precise issues were raised by the defendants, Volpe and DiBenedetto, in their Motions for Severance, Order of Trials, and in their Motions for Judgment of Acquittal or New Trial as previously set forth.

The defendant, Volpe, as set forth in the Pre-Trial Hearings, discussed previously, made known to the Court that gambling defendants would testify in his behalf, and further pointed out that it would save time to try the gamblers first as they usually plead out, and thereby would become available to the defense. The Government even agreed that the present order of trials would not expedite the business of the Court. [Vol. VII, p. 12-14, 23-38; Vol. VIII, p. 33-36, 55-56]

POINT II

B. THE DISTRICT COURT ERRED IN DENYING APPELLANT DI BENEDETTO'S PRE-TRIAL AND TRIAL MOTIONS FOR SEVERANCE BECAUSE HE WAS WRONGFULLY JOINED UNDER RULE 8(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The defendant, DiBenedetto, was prejudicially joined in his trial with the defendants, Michael T. O'Brien and Anthony D. Volpe. The misjoinder is evident from the acquittal of the defendant, DiBenedetto, on the gambling counts (III and IV) which allegedly justify the joining together as previously set forth in the Background portion of this argument.

A joinder under Rule 8(a) and (b) of the Federal Rules of Criminal Procedure can be, and often is, tested on a Motion for Severance. The problem here is that the defendant, DiBenedetto, was wrongfully joined with the other defendants on the basis of similar acts and not "a series of acts or transactions" as required under Rule 8 of the Federal Rules of Criminal Procedure. It provides under "Joinder of Offenses and of Defendants":

"(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

A good illustration of this problem is found in United States v. Grasso, 55 F.R.D. 288 (E.D. Penn. 1972). Grasso held that a joinder of defendants under Rule 8(b) of the Rules of Federal Criminal Procedure was not authorized unless the activity the defendants engaged in constituted more than "similar acts". In other words, "similar acts" do not constitute a "series of acts or transactions" under Rule 8(b), and cites decisions holding that a severance must be granted if the joinder of defendants does not fall within Rule 8(b). The

Grasso indictment involved ten counts and sixteen defendants alleged to have made illegal representations in the sale and financing of homes to secure federal funding during a period of one year and ten months. Grasso holds:

"Merely because the defendants worked out of the same real estate office and that they are charged with the same or similar violations of law is not a basis in and of itself for joint trial. The test of whether the acts of the defendants are part of a series of acts or transactions depends on the existence of a common plan. [Citations omitted] The offense must arise out of the same transaction or be connected together. [Citations omitted] The defendants must have 'participated...in the same series of acts or transactions...' A series is something more than mere 'similar' acts. [Citations omitted] The common activity must constitute a substantial portion of the proof of the joined charges. [Citations omitted] The conduct upon which each of the counts is based must be part of a factually related transaction or series of events in which all of the defendants participated."

The Grasso opinion concluded that there was, at best, a series of separate and unconnected defenses, and therefore an impermissible joinder which in and of itself creates prejudice mandating a severance.

A more recent illustration of this problem is found in United States v. Whitehead, 539 F. 2d 1023 (4th Cir. 1976) involving a trial wherein two defendants were tried together for distribution of cocaine. They were alleged to have been involved in two drug transactions with the same third party. All three of the involved individuals lived in the same apartment building. The Court found that there should have been a severance and ordered a new trial.

The Whitehead decision points out that the burden is on the government to show that persons to be joined participated in the "same acts or transactions" or "in the same series of acts or transactions". Although there was a "series" of transactions involving a common denominator, Jackson, the government did not meet its burden of proving that there was any connection between Whitehead and the co-defendant's offense. This is the case here where the government's claim was that the defendant, DiBenedetto, was connected to the defendants, Volpe and O'Brien, via the gambling counts. However, he was acquitted of Counts III and IV. Therefore, he was improperly joined as a matter of law under Rule 8(b) of the Federal Rules of Criminal Procedure. The defendant, DiBenedetto, was also prejudiced under Rule 14 of the Federal Rules of Criminal Procedure due to the nature of the evidence on Counts I, II, VI and VII involving four alleged extortions, in which it was claimed that his co-defendant in Count V, Volpe, participated by his being a partner in the gambling and collection business. The government has not met the "same transaction" or "series of transactions" tests, as the offenses objected to involved different parties, different dates and different times. The defendant, DiBenedetto, was not indicted for any of the offenses alleged in Counts I, II, VI and VII, nor was he alleged to be involved in any of the other extortion activities. It is a situation often referred to as "birds of a feather flock together" and

"guilt by association" coming into play and influencing the jury. It is the type of situation that cannot be cured by cautionary instructions, as it permeates the entire proceedings.

Cautionary instructions have come into question in recent years and have been severely limited, particularly in the case of prejudicial evidence, as recognized by the United States Supreme Court in Bruton v. United States, 391 U.S. 123 (1968). This is a classic "spill-over" situation that can only be corrected by a severance, and therefore the defendant, DiBenedetto's, conviction should be reversed and a new trial ordered.

There is an extended discussion of the occurrences at trial set forth in Point III Part C of this argument, and therefore they are not detailed here but merely summarized.

The Whitehead decision is similar to the Count V extortion allegedly involving the defendants, Volpe and DiBenedetto, as they are not named in the other extortions listed under Counts I and II as part of the pattern of racketeering conduct - e.g., Rydel, Barresi, Palanzio and Hames. Nor are they named in Counts VI and VII charging Michael O'Brien and others with extortion activities directed towards Hames and Barresi.

The defendant, DiBenedetto's, only tie to the others is an alleged meeting on one day at 103 New Britain Avenue, Hartford, Connecticut. Furthermore, the evidence on the other extortions was not offered against him. Obviously, the defendant, DiBenedetto, could not have been joined in an extortion trial on Counts VI and VII, and should not have been prejudiced by

the evidence of the extortions, the "bad guy" evidence and portions of tapes and transcripts by persons alleged to have been linked to the co-defendant on Count V, Anthony D. Volpe. This is particularly significant as the defendant, DiBenedetto, was not charged in Counts I or II alleging interstate racketeering. Thus, the evidence of those alleged extortions which was offered to prove the pattern of racketeering and racketeering activities could not have been introduced against him in a separate trial.

The problem is highlighted by the fact that evidence on the other extortion counts was substantial, with victims testifying to real threats in some cases with scary phone calls and body recordings being played. In one instance, an incriminating bug conversation was corroborated by F.B.I. surveillance and pictures. In other words, the government was joining strong extortion cases involving other defendants and counts with Count V charging conspiracy to extort by an implicit threat, all in an effort to prove its weak case on Count V.

This practice has been forbidden in United States v. Foutz, 540 F. 2d 733 (4th Cir. 1976). Foutz was tried by a jury, after a denial of his severance motion, for two armed robberies involving the same bank within a two and one-half month period. One case was strong against him and the other was weak. He argued that the strong evidence "spilled over" into the weak case, and helped convict him on the weak case. The Court agreed,

reversed and granted a new trial. Furthermore, the Court of Appeals expressly rejected the government's argument that the Court's instructions to consider each offense and the evidence thereon separately cured the problem.⁸ The Court of Appeals held that the inherent damage of the strong evidence influencing the weak case could not be cured by a cautionary instruction. In other words, the jury may be influenced by the evidence of the criminal activity in the case on one count, and therefore draw a conclusion as to the guilt or guilty disposition of the defendant on other counts.

Another decision in point is United States v. Ragghianti, 527 F. 2d 586 (9th Cir. 1975). The defendant was charged with two counts of bank robbery. The government had a strong case on one count and a weak case on the other count. The defendant moved for severance which was denied, and the jury convicted him on both counts. After the jury verdict, the judge set aside the conviction on one count on the basis that there was insufficient evidence to support the conviction. Ragghianti specifically held:

"Where a charge justifying joinder turns out to lack evidence, the trial judge should be particularly sensitive to the possibility of prejudice. Schaffer v. United States, 362 U.S. 511, 516 (1960) dictum."

Ragghianti, supra, at 587.

The Court goes on to make it clear that there are three dangers of prejudice when there is a joinder of offenses not arising out of the same transaction. First, the jury may

consider that the defendant may be bad to have been charged with so many things. Second, the proof on one offense may come into the trial even though it is not admissible on the joined offense. Third, the defendant may wish to testify on one count, but not on another count, and be barred from testifying at all. The Court in Ragghianti reversed on the first and third dangers. All three dangers were present in this case, as the defendant, DiBenedetto, could not testify on the gambling count as noted to the Court at the argument on his Motion for New Trial and Judgment or Acquittal. Furthermore, the evidence on the extortions and racketeering, the extortion set forth in Counts VI and VII, and the racketeering Counts I and II could not have been admitted in this trial on the extortion count. Lastly, the mass accumulation of evidence of criminal activity that came into the trial, much of which was inadmissible, must have affected the jury's thinking. Consequently, the defendant, DiBenedetto, was in effect really charged on Count V with a similar act, rather than a series of transactions other than the same series of acts or transactions constituting an offense or offenses. Therefore, the Motion for Severance should have been granted and a separate trial ordered.

POINT III

- C. THE DISTRICT COURT ERRED IN DENYING APPELLANT DI BENEDETTO'S PRE-TRIAL AND TRIAL MOTIONS FOR SEVERANCE BECAUSE DI BENEDETTO WAS PREJUDICIALLY JOINED IN VIOLATION OF RULE 14 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Background Facts

It is impossible to relate all of the incidents, and it is difficult to select among them to show the prejudicial effect of a joint trial of the defendant, Lawrence DiBenedetto, with the defendants, Volpe and O'Brien. It was a lengthy trial with approximately 2250 pages of transcript, accompanied by a large number of exhibits. However, the following are illustrative of the situation the defendant, DiBenedetto, faced as a result of his joint trial.

In numerous instances throughout the trial, exhibits were offered against the defendants, Volpe and O'Brien, but not as to the defendant, DiBenedetto. In order to assist the jury, the defendant, DiBenedetto, moved that those be marked as "not offered as to DiBenedetto". This motion was denied by the Court (Clarie, J.). [Vol. XIII, p. 188] In another instance, Exhibit 135, a business card, was introduced to show a connection between a Mr. Barone, who was caught red-handed in the Rydel extortion, and offered as to the defendants, O'Brien and Volpe, but not as to the defendant, DiBenedetto. However, the card directly implicated the defendant, O'Brien, who DiBenedetto was alleged to be connected with in the gambling operation, and it bolstered the connection between the "Mope" (Del Mastro) and collection activities of Mr. O'Brien. It had O'Brien's name

and a telephone number on it and the name "Mope" and a telephone number on it. Furthermore, it was taken off Barone at the time of his arrest in the Rydel incident. [Vol. XIII, p. 207-22] The Rydel incident was the subject matter of a separate indictment, but was charged in this case as part of the racketeering pattern. The defendant, DiBenedetto, was not involved, nor was he alleged to be involved, in the incident. Furthermore, none of the tapes and transcripts which concern the Rydel extortion or which came from the bug were offered against DiBenedetto. [Vol. XIII, p. 209] However, a review of those transcripts (Exhibits 137 and 138) indicate their prejudicial "bad guy" violent contents. [Vol. XIV, p. 430-31] They were played for the jury later in the trial. [Vol. XXII, p. 1818] Additionally, there were numerous transcripts of tapes with no relevance or connection to Mr. DiBenedetto being offered. Furthermore, the tapes were offered to link Del Mastro and Volpe in collection activities. They had nothing to do with the defendant, Di Benedetto, and involve other counts and other people such as the Rydel situation. Thereby, there is a spill-over effect on to the Fifth Count, and as a result the defendant, DiBenedetto, renewed his Motion to Sever on May 5, 1977, which the Court (Clarie, J.) denied. [Vol. XIV, p. 430-31]

The defendant, DiBenedetto, again renewed his objections to the numerous calls detailing criminal activity, on the grounds that they were not relevant to him, but the objection was

overruled. [Vol. XIV, p. 515-16] The government's claim was that the defendant, DiBenedetto, was part of a gambling business and thereby they were admissible due to the conspiracy count - upon which the defendant, DiBenedetto, was acquitted.

The incident involving Mr. Di Biagio and Mr. Volpe in collection activities was not offered as to the defendant, DiBenedetto, but the jury heard it and still had to consider the relationship between the defendant, DiBenedetto, and the defendant, Volpe, as charged co-conspirators on Count V. Therefore, the defendant, DiBenedetto, again renewed his severance motion and stated the following reasons and the Court (Clarie, J.) denied the same. [Vol. XV, p. 622-23]

"Mr. DiBenedetto is not charged in the first two counts, in the RICO counts. He is only charged with being a conspirator in the extortion count, I believe the Fifth Count.

Now, when we let this evidence in, of Mr. Del Mastro's activities, and his alleged connection with Mr. Volpe, the jury can't put that out of their minds. It is something that they will carry with them to the jury room - and he is prejudiced by it. It shouldn't be tried in this case with this type of testimony.

And, therefore, I object to it coming in as to him. And I don't think that a cautionary instruction is enough. And, once again, I am asking that he be severed out of this trial."

Another example of the inadmissible evidence introduced against the defendant, DiBenedetto, is a telephone conversation [Exhibit 130-NN] involving the defendant, Volpe, and an unknown person in an alleged illegal loan transaction. It did not concern nor was it connected to the defendant, DiBenedetto.

Therefore, the defendant, DiBenedetto, objected and it was overruled. [Vol. XVI, p. 766] It would not have been admissible in a separate trial against the defendant, DiBenedetto, and its admission in the joint trial prejudiced him.

Another illustration is the playing of Exhibit 138 [Transcripts Exhibits 138 and 138-a] which are bug device recordings of collection activities offered as to defendants, Volpe and O'Brien, but not as to the defendant, DiBenedetto. They were obviously offered to show the methods used to collect the various illegal debts. Thus, they were particularly prejudicial and the jury heard them on the collection activities of the defendants, Volpe and O'Brien, and would not have heard them in a separate trial involving the defendant, DiBenedetto - even if he was tried with the defendant, Volpe, on Count V. [Vol. XVII, p. 813-24]

A blatant indication of the prejudice that resulted from this joint trial is illustrated by the so-called "Juice Slip". It was seized from the defendant, Volpe, at the time of his arrest. It was introduced as Exhibit 52, and purported to be a list of collection/debtor victims, and was offered as to the defendant, DiBenedetto, over his objections. The defendant, DiBenedetto, was charged in Count V of being in a conspiracy with the defendant, Volpe, to collect money from Mr. Demirs. Mr. Demirs' name was not on the list. The conspiracy allegedly took place in December of 1974 and January of 1975. The card

was seized in 1976. The objection is that it lends credence to the Volpe/DiBenedetto tie in collection activities. Thus, the defendant, DiBenedetto, is tainted with it. Therefore, he requested a severance or limiting instruction. The government claimed it on the ground that it showed the defendant, Volpe's, debt collection business, corroborated Mr. Del Mastro's employ and his use by Mr. Volpe to collect Volpe's debts. Therefore, it was admitted. However, since it would be inadmissible in a separate trial on the Fifth Count, it is prejudicial to the defendant, DiBenedetto, as the evidence spills over into the Fifth Count. Thus, a separate trial for the defendant, DiBenedetto, was again requested and was denied. [Vol. XVIII, p. 1045-47, 1100]

A further illustration is the evidence of a beating given by the defendant, O'Brien, to one of his employees for cheating a customer in a card game. It was offered as to the defendant, DiBenedetto, as the government claimed that the violence was part of the gambling business that he was charged as being a part of in Counts III and IV. It came in over the defendant, DiBenedetto's, objection. However, it would not have been admissible in a separate trial on the extortion count. It should be kept in mind that the defendant, DiBenedetto, was acquitted on the gambling counts. [Vol. XVIII, p. 1109-10]

Another incident involves the playing of Exhibit 129-G during Mr. Del Mastro's testimony concerning the Demirs incident.

It is a conversation between Mr. Del Mastro and the defendant, Volpe. It referred to collection attempts and has Mr. Del Mastro saying that he would do whatever he had to do to collect the money. It then turns out to be unrelated to Count V, and could not be related to anything. It may even involve a totally different situation in Springfield, Massachusetts. The defendants, Volpe and DiBenedetto, moved that it be stricken and a cautioning instruction be given. Those motions were denied. [Vol. XVIII, p. 1124-28]

The defendants, Volpe and DiBenedetto, objected to the admission of extraneous extortion evidence involving Rydel, Rago and Barone and their activities. The objections were overruled on the government's representation that it showed that the defendant, Volpe, and the defendant, DiBenedetto, to be in a debt collection business. The defendant, DiBenedetto, particularly objected as he was not even charged in the first two RICO counts. The defendant, DiBenedetto's, motions to strike and for a cautionary instruction were denied. Yet, the government never showed the defendants, Volpe and DiBenedetto, to be in a debt collection business, and a search of the record shows no witnesses testifying that the defendants, Volpe and DiBenedetto, were in a debt collection business. [Vol. XIX, p. 1171-74]

In a very extensive part of the trial, the jury heard a great deal of testimony concerning debt collection activities of the defendant, O'Brien, involving a Mr. Palangio, [Vol. XX,

p. 1550-89]; a Mr. Hames [Vol. XX, p. 1590, Vol. XXI, p. 1643]; a Mr. Joseph Rydel [Vol. XXI, p. 1643-1717]; a Joseph Barresi [Vol. XXI, p. 1717-61]; a Vincent Barresi [Vol. XXI, p. 1762-78], which, although not offered as to the defendant, DiBenedetto, was prejudicial to him due to the alleged collection activities employed. Mr. DiBenedetto had no connection whatsoever with this activity, and once again this testimony could not have been admitted in a separate trial. However, it added a flavor to the whole proceedings - e.g., the Barresi telephone threats to burn a house down. [Vol. XXI, p. 1770-75] All of the aforementioned evidence was offered against the defendants, Volpe and O'Brien, on Counts I, II and VII, which did not include the defendant, DiBenedetto, and could not help but spill over and influence the jury in considering the matter.

The final example of the prejudicial nature of joinder in this trial was the calling of Betty Beaulieu, to tie the defendants, Volpe and O'Brien, together in the gambling business. She testified to her knowledge and acquaintance with Volpe and O'Brien, and identified them and further identified Mr. DiBenedetto [Vol. XXII, p. 1822-23], but never mentioned the defendant, DiBenedetto, again in all of her testimony. [Vol. XXII, p. 1819-68] It is a classic "guilt by association", "birds of a feather" tactic which prejudiced the defendant, DiBenedetto, and is indicative of the entire problem of trying Mr. DiBenedetto with Mr. Volpe and Mr. O'Brien.

At the close of the government's case, the defendant, DiBenedetto, once again moved in the alternative that his case be severed from the defendants, Volpe and O'Brien, or that in the alternative Count V be severed due to the massive evidence of extortion activity in which the defendant, DiBenedetto, was not a party, and particularly the prejudicial nature of the telephone calls played in those matters - e.g., the telephone calls to Mr. Rydel's wife. In addition, the entire aura or atmosphere created by that evidence, which would otherwise be inadmissible as to the defendant, DiBenedetto, was brought to the Court's attention. The Court (Clarie, J.) denied the complete severance and the partial severance. [Vol. XXII, p. 1915-15]

Argument

The foregoing decisions cited in Point II, Part B of the Severance Section of this Brief are equally applicable here and incorporated herein. The decisions in Whitehead, supra, Foutz, supra, and Ragghianti, supra, are equally applicable to this argument.

It has long been recognized in this Circuit that the granting of a severance is proper when it appears that a co-defendant in a joint trial will be prejudiced by the accumulation of evidence of wrongdoing by his co-defendants. United States v. Kelly, 349 F. 2d 720 at 756 (2nd Cir. 1965). Kelly also indicates that

cautionary instructions may not be able to undo the harm. Id at 758. It should be noted that Kelly is pre-Bruton v. United States, 391 U.S. 123 (1968). Kelly also notes that a trial judge is under "a continuing duty at all stages of the trial to grant a severance if prejudice to a particular defendant is made manifest". Kelly, supra, at 759. The Kelly decision explains that the prejudice may not be obvious at the beginning of a trial, but that as the trial drags on the prejudice may become more evident with each passing day.

A key portion of the Kelly decision is as follows: "The principle and inevitable prejudice, however, was caused by the slow but inexorable accumulation of evidence of fraudulent practices by Shucks' co-defendants, Kelly and Hagen." Ibid. The Court then briefly summarizes their criminal activity, and concludes it must have stamped the co-defendants "in the eyes of the jury as unscrupulous swindlers of the first rank". Ibid. The Court then held: "That some of this rubbed off on Shuck we cannot doubt." Ibid. The Court continues to summarize evidence against the co-defendants that would have been inadmissible as to Shuck, and concluded that a Motion for Severance should have been granted. Ibid. It is submitted that the Kelly decision is clearly controlling here where the defendant, DiBenedetto, repeatedly renewed his Motions for Severance as the trial developed, and where the same things that occurred in Kelly occurred in his trial as borne out by the trial narration previously set forth.

A more recent decision, United States v. Mardian, 546 F. 2d 973 (D.C. Cir. 1976) also supports the defendant, DiBenedetto's, claim for severance. It arose out of Watergate and both cites and relies heavily on Kelly, supra. It is worth quoting in part:

"...Courts have always kept in mind the problems inherent in trial of conspiracy cases involving numerous defendants. The Supreme Court has long recognized that in such cases "the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant. [citations omitted] The 'dangers of transference of guilt' are such that a court should use 'every safeguard to individualize each defendant in his relation to the mass'. [citations omitted]

Particularly where there is a great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that that guilt will improperly rub off on the others. [citations omitted]

In Kelly the Court of Appeals for the Second Circuit emphasized that severance is among the most important safeguards available to minimize the risk of prejudice, and it ordered a new separate trial for the one alleged co-conspirator who was disadvantaged by the disproportion in the evidence. Id at 756. [citations omitted] This court has often expressed its acceptance of the rule announced in Kelly, requiring severance when the evidence against one or more defendants is 'far more damaging' than the evidence against the moving party. [citations omitted]

Mardian made out a fairly strong case under the Kelly doctrine when he moved for severance before trial. JA 318-325. He pointed out that, unlike the other six original indictees he had been named only in the conspiracy count. All the others were named at least in Count 2, charging the substantive offense of obstruction of justice; four were accused as well of one or more individual counts of perjury. Count 1, charging them all with conspiracy, alleged 45 overt acts. Of these only five involved Mardian."

Mardian, supra, at 977-78

"Moreover, tape recordings of conversations between conspirators played an undeniably important role in the prosecution's case. Twenty-four of the 30 tapes the prosecution played presented conversations that occurred during March and April of 1972, further underscoring the significance of that time period. Mardian was not a participant in any of the 30 taped conversations. His name was mentioned five times on the tapes played to the jury. He challenged in timely fashion each of the references as inadmissible and moved to have them deleted, supporting his motion with a lengthy memorandum of points and authorities. JA 638. The court did delete a few references, but the five challenged here remained."

Mardian, supra, at 978.

The Mardian decision is very similar to the defendant, DiBenedetto's, position before, during and after trial. It is even more persuasive in light of the defendant, DiBenedetto's, acquittal on the gambling counts, since the government used those counts to claim admissibility of the lion's share of the conversations and criminal activities introduced at trial.

In light of the decisions previously cited, and particularly Kelly and Mardian, it is submitted that the District Court should have granted the defendant, DiBenedetto's, Motions for Severance on one of the many occasions raised prior to trial, during trial, and post-trial. This is particularly evident as regards the extortion count. There would have been no undue burden on the court system, as the gambling counts could have been tried with the gambling defendants. The extortion count, estimated at two days trial time, could have been tried with the extortion defendants. Therefore, it is submitted that it was error to deny the defendant, DiBenedetto's, Motions for Severance. Thus, his conviction on Count V should be reversed and a new trial ordered.

IV. THE DISTRICT COURT ERRED IN REFUSING TO GIVE THE CHARGE REQUESTED BY APPELLANTS FROM U. S. V. CURCIO CONCERNING THE DEFINITIONS OF IMPLICIT THREATS IN AN EXTORTION CHARGE

Count V of the Indictment charged the defendants, Volpe and DiBenedetto, with a conspiracy to commit an extortion by the use of implicit and explicit threats in violation of 18 USC 894. The alleged victim, George Demirs, was called as a witness by the Government and asked to relate specific events of the transaction. Mr. Demirs never testified that any explicit threats were made to him. [Vol. XX, p. 1527-30] Mr. Demirs, in fact, testified that he was never in any fear as a result of his conversations with Mr. DiBenedetto and Mr. Del Mastro. [Vol. XX, p. 1543-44, 1546]. Evidence was also submitted that Mr. Del Mastro telephoned Mr. Demirs later on the day of the visit and told him that no one was trying to put pressure on him. [Vol. XVIII, p. 1117] [Exhibit 126-A] Mr. Demir told Mr. Del Mastro in a casual manner during this conversation that Mr. DiBenedetto should not come to his place of business. Mr. Del Mastro answered in response that he understood, that no one was trying to force Mr. Demirs to repay. Mr. Del Mastro simply told Mr. Demirs that he should repay some of the money. The remainder of this conversation is spent talking about Mr. Del Mastro and Mr. Demirs' mutual experiences [making bets.] The tone is friendly and accommodating throughout. [Exhibit 126-A] A subsequent conversation on January 23, 1975 between Mr. Del Mastro and Mr. Demirs is also obviously friendly. [Exhibit 126-D] Mr. Demirs

testified at trial that he was never in any fear. [Vol. XX, p. 1543-44, 1546] Mr. Del Mastro testified that all Mr. Volpe said was that if you want to earn some money, help Mr. DiBenedetto collect money. [Vol. XIX, p. 1373]

Concerning the Fifth Count, charging the defendants, DiBenedetto and Volpe, with conspiracy to commit extortion, the defendant, DiBenedetto, and the defendant, Volpe, requested the Court to charge the jury that, in determining whether or not implicit threats were used, the jury must find beyond a reasonable doubt that:

"Acts or statements constitute implicit threats only if they instill fear in the person to whom they are directed or are reasonably calculated to do so in light of the surrounding circumstances and there is an intent on the part of the person who performs the act or makes the statement to instill fear."

Requests to Charge of DiBenedetto, Number 4 and also Volpe, Number 5 [Docket Entries, May 25, 1977]

The importance and appropriateness of this charge was argued before the Court by defendant DiBenedetto and by defendant Volpe. [Vol XXIII, p. 2197-2209] The trial judge, however, rejected this argument and instead instructed the jury with the following charge:

"Nor is it necessary that the threats, if you find one or more were made, actually placed George Demirs in fear of harm to himself or to his property. Actual fear is not necessarily an element of the offense. You need only conclude, to find that a statement by a defendant was an extortionate means, that the statement was designed or reasonably calculated to induce fear, in the light of the surrounding circumstances, in the mind of an ordinary person."

"It is the conduct of the defendants, nor the victim's state of mind, to which the statute is directed."

[Vol. XXIV, p. 2302-2303]

The Court thereby charged the jury that actual fear is not necessarily an element of the offense. The Court's charge also omitted instructions charging the jury that actual intent to instill fear is an element of the offense and that the jury must find such intent to convict the defendants, DiBenedetto and Volpe, of extortion on the theory of an implicit threat.

For an act or statement to constitute an implicit threat and qualify as extortion in violation of 18 USC 894, one of two circumstances must be proven: (1) it must instill fear in a person to whom it is directed; or (2) it must be reasonably calculated to instill fear in light of the surrounding circumstances and there must be an intent on the part of the actor or declarant to instill fear. United States v. Curcio, 310 F. Supp. 351 (D. Conn. 1970). In the Second Circuit, this rule concerning implicit threats differs from cases which involve explicit threats. In the latter type of the case, it has been held that the victim's state of mind is not an element of the offense. United States v. Natale, 526 F. 2d 1160 (2nd Cir. 1975). It should be noted that Natale did not overrule Curcio, but rather quoted it with approval. See, 526 F. 2d at 1168.

The distinction between explicit and implicit threats is important. Implicit threats may be vague and their status as

threats uncertain. Evidence of the surrounding circumstances and the victim's actual perception of fear is important in clarifying the true nature of an act or statement alleged to be an implicit threat. Other Circuits, in fact, have held that evidence of the victim's perception of fear and its reasonableness are vital factors to be considered, and must be proven in order to sustain a charge of extortion. See, Carbo v. United States, 314 F. 2d 718 (9th Cir. 1963); United States v. Nakaladski, 481 F. 2d 289 (5th Cir. 1973), cert. denied, 414 U.S. 1064; United States v. Biondo, 483 F. 2d 635, 643 (8th Cir. 1973), cert. denied, 415 U.S. 947 (1974). At least prior to Natale, the Second Circuit had also accepted this rule regarding the victim's actual state of mind as being a basic element of the offense of extortion. See, United States v. Zito, 467 F. 2d 1401, 1404 (2d Cir. 1972).

A second basic element of the crime of extortion under 18 USC 891 and 1894 is an intent on the part of the person who makes the threats to instill fear. Intent is an element whether the threat is explicit or implicit. United States v. Natale, *supra*; United States v. Curcio, *supra*. The opinions in both Natale and Curcio emphasize this element of intent:

"To be convicted, the defendant must have intended to make a 'threat of use, of violence or other criminal means...'"

United States v. Natale, 526 F. 2d at 1168.

"Acts or statements constitute implicit threats only

if they...are reasonably calculated to be so in light of the surrounding circumstances and there is an intent on the part of the person who performs the act or makes the statement to instill fear." [emphasis supplied]

United States v. Curcio, 310 F. Supp. at 357.

In the instant case, it is uncertain whether the statements made to Mr. Demirs by the defendant, DiBenedetto, were meant as implicit threats. Although called as a witness by the Government, Mr. Demirs never testified that any explicit threats were made against him. The subsequent conversations between Mr. Del Mastro and Mr. Demirs testified that he was never in any actual fear. It is particularly significant that in the phone call which Mr. Del Mastro made to Mr. Demirs on the same date as the alleged threats, Mr. Demirs told Mr. Del Mastro that Mr. DiBenedetto should not come to his place of business. It is not likely that such a statement would be made by a person who has been the victim of recent statements intended to be threats against him.

Because of the uncertainty surrounding the alleged threats made by Mr. DiBenedetto and Mr. Del Mastro, it was particularly important in the instant case that the jury be permitted - and instructed - to examine every aspect of the surrounding circumstances, including the alleged victim's state of mind. The jury should have had as many facts as possible at their disposal. An alleged victim's state of mind is highly probative of whether an implicit threat, which may seem innocuous to an ordinary passerby, is meant as a threat. The trial judge should

have charged the jury that the victim's state of mind was a factor to consider when deciding if the defendant, DiBenedetto's, statements constituted implicit threats. The failure to so charge was error.

For the same reasons, it was just as important for the jury to be specifically instructed that an act or statement must be intended as a threat by the accused. In the case at bar, the jury was charged that the victim's state of mind is not necessarily an element of the offense. After such an instruction, a charge as was given, that the jury need only conclude from the surrounding circumstances that a statement was designed or reasonably calculated to induce fear is insufficient by itself. Such a charge includes only one of the two elements necessary to constitute an implicit threat. See, United States v. Curcio, supra.

A charge which included an instruction regarding intent was particularly important under the circumstances of the instant case. There was evidence that little was said by the defendant DiBenedetto to Mr. Demirs, and there was little evidence that the defendant DiBenedetto's statements were intended as threats. The subsequent conversations between Mr. Del Mastro and Mr. Demirs which were introduced into evidence are particularly noteworthy because they reveal the friendly and casual relationship which existed between the defendant, Mr. Del Mastro and Mr. Demirs. It is unlikely that the defendant DiBenedetto

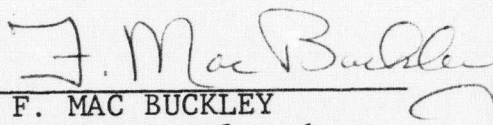
intended to put Mr. Demirs into fear simply with the statements that Mr. Del Mastro and Mr. Demirs testified that he actually made. Defendant DiBenedetto's intent is further thrown into doubt by the testimony of the victim himself who said he was never in any fear. Under these circumstances the court should have charged the jury that, in addition to finding that the statements by defendant DiBenedetto and Mr. Del Mastro were reasonably calculated to instill fear in the mind of an ordinary person, they must also find that the defendant and Mr. Del Mastro intended to instill fear in the alleged victim, Mr. Demirs. A charge regarding intent is mandated by the holdings in Natale and Curcio. To omit it was error and the convictions should be reversed and a new trial ordered.

CONCLUSION

Appellants, for the reasons submitted, respectfully
urge that their convictions be reversed, and the matters be
remanded for a new trial.

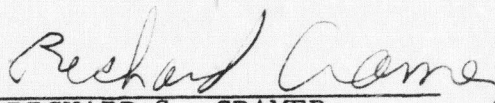
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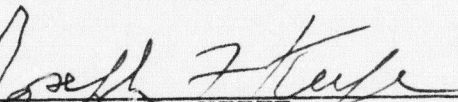
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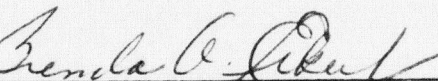
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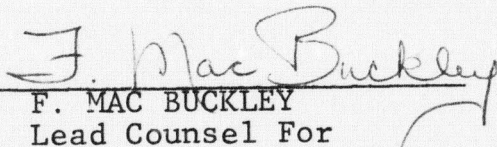
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